Missouri Attorney General's Opinions - 1936

Opinion	Date	Topic	Summary
1-36	Feb 25	SCHOOLS.	Is mandatory upon the board of directors to pay high school tuition, and voters cannot vote not to pay same.
1-36	June 10	TAXATION.	When property of a corporation is exempt from taxation on the ground that it is devoted exclusively to religious and educational purposes.
1-36	July 24	Hon. H. D. Allison	WITHDRAWN
1-36	Aug 12	ELECTIONS.	Candidate for ward registrar who withdrew verbally the day before election, whose name was not taken off the ballot but subsequently received the most votes, is the legal nominee and if he does not desire to accept the nomination the county committee can fill the vacancy as provided in Sec. 10268, R.S. 1929. When 2 candidates for constable receive same number of votes, nominee should be determined by lot by canvassers.
2-36	Jan 10	SHERIFFS. POLICE OFFICERS. FINGERPRINTS.	When the sheriff or police officer is entitled to fingerprint and photograph without incurring personal liability. Admissibility of photographs and fingerprints in evidence in criminal cases.
2-36	Feb 7	ROADS & BRIDGES.	Interest derived from county depositary on funds, goes to “county road and bridge funds”.
2-36	Feb 21	ELECTIONS. JUDGES AND CLERKS.	Counties of 200,000 to 400,000 inhabitants.
2-36	Mar 30	BUS AND TRUCK LAW.	A partnership engaged in transporting for hire, by special agreement, the property of the individual members of the partnership must have a contract hauler’s permit.
2-36	May 19	CIRCUIT CLERKS.	There is no statute at present time governing salary of Circuit Clerk of St. Louis County. Sec. 14563, R.S. Mo. 1929 cannot be made to apply.
2-36	May 25	COUNTY COURTS.	Not permitted to contract debts beyond the anticipated revenues for the year.
2-36	May 27	COUNTY COURT.	Has power to contract with private auditing firm to audit the accounts of county officers.
3-36	May 26	INHERITANCE TAX.	In computing the inheritance tax a deduction for debts of the deceased may be allowed only to the extent of the amount actually paid the creditor, and not as to the face amount of the debt existing at the date of the death of the deceased.
3-36	Oct 20	INHERITANCE TAX.	Brokerage houses are subject to the provisions of Section 583, R.S. Mo.

			1929.
3-36	Nov 9	CIRCUIT CLERK.	Circuit Clerk appointed by Governor “until next general election” relinquishes the office after the general election in November.
4-36	Dec 30	DELINQUENT TAXES.	If County Court compromises taxes in accordance with Sec. 9950, Laws 1933, p. 427, County Collector is not personally liable.
5-36	Jan 16	MARRIAGE.	It is not illegal for Circuit Clerk Ex-officio Recorder of Deeds to direct couples to ministers or other persons authorized under the statutes to perform marriages.
5-36	Jan 31	CIRCUIT CLERKS.	Cannot retain fees allowed in excess of the amount as contained in Section 11786, Laws Mo. 1933.
5-36	Mar 28	CITIES.	City of fourth class may, by ordinance, provide for the appointment of a collector of light and water revenue.
5-36	Apr 18	VILLAGES AND TOWNS.	Villages and towns should style their ordinances in accordance with the statutes relating to such villages and towns.
5-36	Aug 14	COMMITTEE.	Organization of County Committee.
5-36	Aug 31	APPROPRIATIONS.	Construction of the word “repair” as it appears in the Appropriation Act.
5-36	Sept 22	ROADS AND BRIDGES.	Bond proposition for road purposes cannot be submitted to part of a township – whole of township must vote for issuance of bonds.
5-36	Dec 3	INCOME TAX.	Under provisions of Sec. 10136, Laws of Mo. 1935, p. 410, it is duty of county collectors and Collector of City of St. Louis to forward all income taxes delinquent for 30 days or more to State Auditor for collection. This applies to 1935 and prior years.
6-36	Feb 4	Mr. Charles Beals, Clerk	WITHDRAWN
6-36	Mar 18	SCHOOL & SCHOOL DISTRICTS. CONTRACT. TEACHERS.	Must state monthly wage and be definite and certain.
6-36	Apr 9	INTOXICATING LIQUOR.	City Ordinance permitting licensees of intoxicating liquor to sell 3.2% beer on Sunday is in conflict with State law, and void.
6-36	May 29	COUNTY TREASURER.	By reason of Sec. 12132a, Laws 1933, p. 338, office of county treasurer in counties of less than 40,000 inhabitants is abolished and from Jan. 1, 1937 duties of office will be carried on by County Collector.
6-36	Sept 18	Hon. C. Jasper Bell	WITHDRAWN
6-36	Oct 23	ELECTIONS.	(1) Board of election commissioners cannot continue to receive

			applications for erasure of names after Monday noon, October 19, 1936 under Section 10596, RSMo 1929; (2) Board of Election Commissioners or any two members do not have power to order recanvas of Kansas City or Portion thereof under Section 10568, RSMo 1929.
6-36	Oct 26	ELECTIONS.	Certificate for county offices may be filed with county clerk not later than 10 days before election for November Election, 1936.
6-36	Nov 24	TAXATION & REVENUE.	County Court may through prosecuting attorney and circuit judge levy special taxes to pay past due indebtedness under Section 9868, R. S. Mo. 1929.
7-36	Sept 30	Hon. Davis Benning	WITHDRAWN
8-36	Feb 4	OLD AGE ASSISTANCE.	Proposed escrow agreement in connection with the Old Age Assistance Commission of Iowa must be acknowledged, real estate described, same must be recorded with the Recorder of Deeds. Recorder of deeds to receive regular statutory fee, and all executed according to the laws of the State of Missouri.
8-36	Mar 24	MOTOR VEHICLES.	No person under age of 16 years permitted to drive motor vehicle in the State of Missouri, although perhaps in many instances more competent than many adults.
10-36	Jan 15	Mr. Wallace I. Bowers	WITHDRAWN
10-36	Jan 21	SCHOOLS.	Orphan children permitted to attend school in any district in which such have a temporary or permanent home and are unable to pay tuition fees.
10-36	Jan 25	NON-INTOXICATING BEER.	City ordinances requiring applicant to be property owner is in conflict with State law on said subject, and void.
10-36	Jan 28	INHERITANCE TAX.	Whether or not a bequest to a hospital is exempt is a question of fact to be determined by reference to the corporate charter and purposes of the corporation.
10-36	July 28	LIQUOR CONTROL DEPARTMENT. APPROPRIATIONS.	Legislature did not appropriate for the payment of burglary or theft insurance.
10-36	Nov 19	Hon. L. G. Boarright	WITHDRAWN
11-36	Jan 18	COMMISSIONER OF AGRICULTURE. EMBARGO. STATE BOARD OF HEALTH.	Neither has authority to issue embargo prohibiting shipment of apples into this state.

11-36	Apr 20	BUREAU OF AGRICULTURE.	Moneys collected by Ag Bureau shall be deposited daily in State Treasury and can be legally paid out only pursuant to Appropriation by General Assembly.
11-36	July 30	ELECTIONS.	Members of C. C. Camps are entitled to vote in the primary if they possess the necessary qualification. Elections Judges can challenge their right to vote and reject their vote if illegal.
11-36	Sept 3	BOUNDARIES.	The Supreme Court of the United States has jurisdiction in a suit between two states to determine boundary line.
11-36	Nov 10	CITIES.	Boards of Aldermen of cities of the 4th Class shall only select an Acting President of the Board in the absence of Mayor or vacancy in office of Mayor.
11-36	Nov 12	Dr. T.L. Bradley	WITHDRAWN
12-36	Jan 30	TRADEMARKS.	Descriptive terms in English or foreign language are not subject to registration under the trademark law.
12-36	Feb 11	Dr. W. J. Bryan, Supt.	WITHDRAWN
12-36	Feb 19	ROADS & BRIDGES.	Mayor of City of Fourth Class has a right to cast a vote for special road commissioner.
12-36	Mar 12	REAL ESTATE.	Authority of State to sell real estate.
12-36	Mar 19	Hon. Dwight H. Brown	WITHDRAWN
12-36	Apr 16	TRADE-MARKS.	Resemblance between two trade names as to raise a probability of public mistaking one for the other may not be registered.
12-36	Apr 22	TRADE MARKS.	Words in common use cannot be trade-marked.
12-36	Apr 29	BONDS. SECRETARY OF STATE. BLUE SKY LAW.	Form of Dealer's Bond; approved.
12-36	May 20	MOTOR VEHICLES.	Safety glass required (1) when care is used for carrying passengers for hire; (2) when car is sold in the State of Missouri and designed for carrying passengers.
12-36	May 26	SECURITIES DEPARTMENT.	Acreage and drilling agreement of H.F. Wilcox is within the exemption of sub-section (f) of Sec. 7726, R.S. 1929.
12-36	July 10	SHERIFF.	Expenses necessary in execution of death warrant are a charge on the sheriff.
12-36	July 25	ELECTIONS.	1. All of the judges at election should select the clerks of election. 2. Judges may not select clerk related to them within fourth degree of consanguinity or affinity.

12-36	July 28	BOND INVESTMENT COMPANIES.	Bond investment company must post one hundred thousand dollar bonds. Companies held to be Bond Investment Companies.
12-36	Sept 11	Hon. Dwight H. Brown	WITHDRAWN
12-36	Sept 14	TRADE-MARKS.	What constitutes an infringement of trade-marks for similarity.
12-36	Sept 24	TRADE-MARKS.	Rules to be followed in trade-marking slogans.
12-36	Oct 1	TRADE-MARKS.	Construction of U. S. C. A., Title 15, Section 85, Page 25.
12-36	Oct 8	BULL FIGHTS.	Whomsoever shall use any designs to attract, provoke, harass or torment any bull shall be guilty of baiting a bull. The giving of any entertainment known as Corrida De Toros (Running of the Bulls) is prohibited.
12-36	Oct 17	MISSOURI CREDIT UNION ACT.	Minors may own shares but can rescind contract and demand return of investment; in instant case minor borrowing value of actual investment, credit union should insist on mother executing promissory note; if not specifically stated in by-laws, it is immaterial what purpose money borrowed by minor is used for; minor has same right in respect to borrowing in excess of holdings as adult member; minor may vote in election of officers.
12-36	Nov 16	Hon. Dwight H. Brown	WITHDRAWN
12-36	Dec 15	ELECTIONS.	When Constitutional Certificate to office shall issue.
13-36	Feb 26	Hon. N. Elmer Butler	WITHDRAWN
13-36	May 20	PUBLIC OFFICERS.	Mayor cannot compel city council to ratify his appointments; Mayor cannot make appointments without the consent of majority of city council.
13-36	May 21	FEES. CRIMINAL COSTS. JUSTICE OF THE PEACE.	Mileage fee in transporting prisoner more than 5 miles to preliminary in Justice Court is not a legal charge against the State or County. (This opinion is in accord with opinion dated November 14, 1935 written to Judge Arthur S. Shaw, Excelsior Springs, Mo. No. 83).
13-36	May 22	RECORDERS FEES.	Recorder must charge fees for services in the amount provided for by law.
13-36	July 9	ELECTIONS.	Appointment of judges in primary elections.
13-36	July 20	COUNTY COLLECTOR.	Should pay balance due on annual settlement. Liable for penalty of 10% per month until paid. When.
13-36	July 31	VOTING.	Members of Citizens Conservation and transient camps are entitled to vote in county and state elections, both as resident voters.

13-36	Aug 25	LANDS. STATE FORESTS.	Legislation is necessary in order for the State of Missouri to obtain benefits of the Fulmer Act; until legislation is enacted the State of Missouri cannot cooperate with the Federal Government.
13-36	Sept 7	SEARCH WARRANTS.	When same may be obtained.
13-36	Nov 17	TAXATION AND REVENUE. DELINQUENT LAND SALES.	Owner of land has two years in which to redeem; if last day falls on Sunday, following Monday is in time.
13-36	Dec 19	COUNTY COLLECTOR. EX OFFICIO TREASURER.	In counties less than 40,000 inhabitants and not under township organization, collector must perform all duties on January 1, 1937, formerly required of county treasurer.
14-36	Apr 10	ELECTIONS.	Sec. 10310, Laws of Mo. 1933, p. 228 is mandatory, and not directory in the counting of votes when it states that the same shall not be counted.
15-36	Jan 3	MOTOR VEHICLES. LICENSE TAX.	Employees of Federal instrumentalities are not required to have a Missouri certificate as a registered operator of an automobile.
15-36	Feb 26	MOTOR VEHICLES.	Definition of "registered operators" applied to facts in case of registered dealer employing irregular employee for purpose of driving cars.
15-36	Apr 29	TAXATION.	Personal property shall be assessed in the county of the owner's residence.
15-36	May 2	JUSTICES' COURTS.	If Justice designates sheriff to serve process and includes same in his minutes, sheriff has power to do so.
15-36	May 7	COUNTY FINANCIAL STATEMENT.	State Auditor prepares forms to be printed and approves financial statement as to form only; it is duty of person designated to prepare financial statement to show that same is correct; if financial statement is not included in preparing the budget, it may be paid out of Classes 5 or 6 or out of an ascertainable surplus in any of the other classes, or out of delinquent taxes.
15-36	Oct 24	SCHOOL FUNDS.	County court has right, absent fraud, to sell property acquired through foreclosure of school funds if such be the most advantageous to the school or schools interested therein.
15-36	Dec 4	MO. STATE HIGHWAY PATROL.	Designation of "sergeant" instead of "patrolman" is immaterial so long as compensation does not exceed that of patrolman; maximum employees of Patrol, exclusive of janitors and clerks are 10 captains and 115 patrolmen; Commission can increase salary of enlisted men who have served five years 10% or any other per cent if it does not exceed $2400 for captains and $1800 for patrolmen.

16-36	Jan 22	MERCHANT LICENSE.	Persons who deal in selling ice at any stand must obtain merchandising license and execute surety bond.
16-36	Feb 4	PENSIONS.	Accrued assistance due applicant to be applied on funeral expenses, when.
16-36	Feb 13	OLD AGE PENSIONS.	May not limit the number of assistance checks sent to out-of-state addresses, and permit same to accrue until persons return to Missouri.
16-36	Mar 13	OLD AGE PENSIONS.	Applicant who has forfeited his citizenship by reason of conviction of desertion, not entitled to receive assistance.
16-36	Apr 17	CIRCUIT CLERKS.	Change of Venue fees earned prior to the first Monday in January, 1935, are payable into the County Treasury.
16-36	Apr 22	OLD AGE PENSIONS.	Federal Grants, to whom paid.
16-36	May 1	INCORPORATED CITIES.	May enact zoning ordinances.
16-36	May 12	Mr. Homer G. Chaffin	WITHDRAWN
16-36	May 15	OLD AGE PENSIONS.	Naturalized citizen entitled to benefits of Old Age Assistance Act even if records of Naturalization have been lost or destroyed, if citizenship can be shown by other evidence.
16-36	May 22	DENTAL BOARD.	Discretion in Board to determine method of examination.
16-36	June 27	DEPARTMENT OF PENAL INSTITUTIONS.	Contract between Metropolitan Mfg. Co. and Dep't. of Penal Institutions is legal.
16-36	Sept 30	MUNICIPAL CORPORATIONS. CITIES, TOWNS & VILLAGES.	Board of Aldermen in Cities of Fourth Class has authority to divide city into wards.
16-36	Oct 10	ELECTIONS. CITIES.	When registrars are elected in cities of 10,000 to 30,000 population.
16-36	Nov 16	COUNTY BUDGET ACT.	When anticipated revenue is exhausted, no more warrants should be issued.
16-36	Dec 17	PROBATE JUDGES.	May not act as appraisers or receive fees in such capacity.
17-36	Feb 12	COUNTY TREASURER. DEPOSITARY OF COUNTY FUNDS.	Liability of County Treasurer on official bond, where no depositary bond is given.
17-36	Oct 15	COUNTY TREASURER.	Receives commission as custodian of school funds out of general revenue fund of the county treasury.
18-36	Aug 5	PROBATE COURT.	Refusal of administration as provided in Section 2, R. S. Mo. 1929.

19-36	Jan 30	TAXATION.	Respecting Attorney's fees in delinquent personal tax cases.
19-36	May 8	SCHOOLS.	Under Section 9226 only majority vote is required to put into effect proposition solely for purpose of repairing and furnishing school.
20-36	Feb 5	OFFICERS. LIMITATIONS.	Section 863 R. S. Mo. 1929 applies to actions against an officer to recover excess salaries, absent fraud.
20-36	Mar 11	OFFICIAL BONDS.	Premium on official bond of State Labor Commissioner cannot be paid out of appropriation of Department of Labor & Industrial Inspection.
20-36	May 1	EMPLOYMENT AGENCIES.	Mandatory to issue license when all statutory requirements have been met.
20-36	July 23	COUNTIES.	County Court can appropriate $3,000 for the establishment of State Employment Bureau in St. Louis County for the purpose of establishing employment in connection with the rules and regulations of the Federal Relief Administration, Washington, D. C., said appropriation being for the purpose of indirectly relieving the county from maintaining and relieving the indigent poor as it is compelled to do under Sections 12961 and 12950, R. S. Mo. 1929.
20-36	Aug 17	Hon. Joe Crain	WITHDRAWN
20-36	Aug 19	INTOXICATING LIQUOR.	License should not be issued to partnership unless all the members have the required qualifications.
20-36	Sept 14	PETIT JURY. CIRCUIT CLERK.	How summoned. One summons for petit jury.
21-36	Jan 15	MUNICIPALITIES.	City's police power and building regulations apply to county property within the city.
21-36	Feb 11	INCOME TAX.	Salaries of county and city officials are considered in computing income tax.
21-36	Mar 19	GAMBLING.	Suit Clubs
21-36	Apr 22	PUBLIC SERVICE COMMISSION.	May require safety appliances on railroads.
21-36	Apr 29	Hon. Elliott M. Dampf	WITHDRAWN
21-36	May 13	INSURANCE.	An insurance company incorporated under Art. IV, Chapter 37, R.S. Mo. 1929 may increase its capital stock as provided in Sec. 5915, R.S. Mo. 1929.
21-36	June 3	PEDDLERS.	Whether or not a person is a peddler depends upon the facts in each case. Peddler defined, discussed and applied.
21-36	June 27	PRIMARY ELECTIONS.	Persons known to be affiliated with one Party not entitled to vote the ticket of the other Party, unless he obligates himself by oath or

			affirmation to support the Party nominees of the ticket he is voting, in the following general election.
21-36	Oct 19	COUNTY BUDGET ACT.	County Clerk does not incur liability on his official bond for issuing warrants so long as the same do not violate the terms of the Act.
21-36	Oct 27	CONVICTS.	Convicts while serving life sentence and dying while so incarcerated, leaving a personal estate within the county of their death, such personal estate shall be administered by the probate court of the county wherein the convict died.
22-36	Jan 2	TAXATION.	Collection of delinquent real estate taxes in cities of the third and fourth classes.
22-36	Sept 9	SHERIFFS.	Sheriffs may purchase supplies for County Jail without obtaining a requisition from the County Court, but it is necessary each order be certified by the Accounting Officer.
24-36	Jan 24	MORTGAGES.	Method of releasing chattel mortgage.
25-36	Jan 13	COUNTY WARRANTS.	County Treasurer is not liable if warrant is regularly issued and regular on its face – is liable if same violates County Budget Act.
25-36	Feb 10	HIGHWAYS. SPECIAL ROAD DISTRICTS.	Commissioners of Special Road Districts, under Article IX, Chapter 42, have exclusive jurisdiction to build roads within the district.
25-36	Aug 18	Hon. Lewis A. Duval	WITHDRAWN
25-36	Dec 12	CORPORATIONS.	Approval of Articles of Agreement of Medical Guild Service, Inc.
26-36	Jan 10	FEES.	Curators of Lincoln University not entitled to per diem and mileage except within the State and not for a greater distance than from Curator's home to place of board meeting.
26-36	July 23	COUNTY COLLECTORS.	County Collector cannot continue to collect income taxes or receive a commission for collecting the same after the income tax has become delinquent and certified to the State Auditor under Section 10136, Laws of Missouri, 1935, page 410.
26-36	Sept 10	CITIES OF FOURTH CLASS.	Unless ordinances provide punishment for prisoner escaping custody, prisoner cannot be brought back from another county; if prisoner returns to city, he can be taken into custody and compelled to serve out remainder of sentence.
27-36	Jan 7	BUS AND TRUCK LAW.	Irregular route permit does not authorize servicing points serviced by regular route permit holders. Venue is in any county through which goods are illegally hauled.
27-36	Jan 10	RECORDER'S FEES.	Recorder of Deeds is not entitled to compensation for making certified copies, but is entitled to fifty cents for his certificate.

27-36	Feb 3	TAXATION.	Right to compensation for improvements by certificate holder upon improvements made by certificate holder.
27-36	Feb 17	INHERITANCE TAX.	Legacy of U.S. bonds or other government securities not exempt from provisions of inheritance tax laws of State of Mo.
27-36	Sept 30	ELECTIONS.	Absentee ballots – An absentee voter may vote his ballot immediately upon receipt of same or on any day prior to and including day of election. Elector voting absentee ballot must be within the confines of the State of Missouri.
29-36	Feb 14	BLIND PERSONS. BLIND PENSIONS.	In an estate by the entirety each owns the whole.
29-36	Feb 28	BLIND PENSIONS.	"Income," as found in Section 8893, R. S. 1929, discussed and defined.
29-36	July 13	CITIES OF THE THIRD CLASS. PAUPERS.	It is not compulsory for cities of the third class to carry Workmen's Compensation Insurance for employees of Electric Light and Water Plants. County Court should bear expense of burying paupers in cities of the third class.
30-36	Feb 8	CHIROPRACTIC.	Board must hold annual election of officers.
30-36	Feb 13	SCHOOLS.	Consolidated District may not divide itself to form two new districts; however, consolidated district may change its boundaries so that part of its territory would be annexed to another district.
30-36	Oct 13	SCHOOLS. COUNTY SUPERINTENDENT OF SCHOOLS.	County Superintendent of Schools is entitled to only actual expenditures for traveling expenses and clerical hire and when the bill is presented to the county court the county court must draw a warrant for same just so long as the maximum amount allowed has not been exceeded.
31-36	Feb 18	INHERITANCE TAXATION.	Proper method to be employed in assessing inheritance tax against legacy to husband and wife.
31-36	May 1	PUBLIC OFFICERS.	Sec 18, Art. IX, Constitution of Mo. does not apply to City of Brunswick or to Chariton County.
31-36	June 15	JUSTICES OF THE PEACE.	Terms of office of appointees, under Section 2136-a, Laws of Missouri 1935.
31-36	July 20	SCHOOLS. CONSOLIDATED SCHOOL DISTRICTS.	Election to dissolve consolidated district under Sect. 9331, must be held at the consolidated school building and the notice of election to dissolve must be given by the Board of Directors.
32-36	June 25	COOPERATIVE ASSOCIATION.	Re: Federal Loans to Cooperatives; Exemptions from certain taxes; Sections 12676 et seq; Sections 12706 et seq; Sections 12748 et seq, R. S. 1929.
33-36	Feb 17	SHERIFF.	Sheriff authorized to purchase supplies for County Jail.

		JAIL.	
33-36	Apr 23	OFFICERS. CITIES.	Term of office of municipal officers shall date from the election, and their salaries cannot be increased during the term for which they were elected.
34-36	July 9	BOARD OF HEALTH- BIRTHS.	Free birth records, when available, are to be furnished for use in perfecting claims for United States Soldiers' pensions.
35-36	Jan 29	TAXATION.	Who entitled to surplus received from tax sale.
35-36	Feb 3	CRIMINAL LAW. MORTGAGED PROPERTY.	Certain evidence admissible in crime of disposing of mortgaged property.
35-36	May 22	CRIMINAL LAW. MORTGAGED PROPERTY. VENUE.	Where to place the in prosecution for sale of mortgaged property.
35-36	May 29	SHERIFFS.	A sheriff may receive only a reasonable compensation for caring for a jury, not to exceed $2.00 per day for each juryman and the officer in charge.
35-36	June 27	BRIDGE LAW. ST. CHARLES COUNTY BRIDGES. LEWIS & CLARK BRIDGE COMPANY.	1. Validity of St. Charles County Bridge Contract. 2. Costs of operating, maintaining and repairing bridges must be paid out of bridge tolls before funds set aside for principal and interest on bonds.
35-36	July 31	INSURANCE.	Reciprocal contracts in insurance may be issued that are non-assessable.
35-36	Aug 24	INSURANCE.	Subscriber's Agreement of Consolidated Underwriters authorizes attorney in fact to issue non-assessable policies.
35-36	Oct 16	TAXATION.	(1) Owner may purchase at tax sale for high bid on third offer. (2) Proceeds of sale to apply to costs and to be prorated to funds. (3) Abandonment of suit does not prevent sale of property at third offering for high bid.
35-36	Oct 17	TAXATION.	Delinquent taxes bear interest at six per cent if taxpayer in bankruptcy.
37-36	Jan 14	CIRCUIT CLERKS.	Deputy Circuit Clerks in Shelby County entitled to compensation fixed by County Court within Statutory limitations.
37-36	Jan 24	SCHOOLS.	Interest collected on delinquent taxes is in effect a part of the tax and should be distributed in proportion to the amount each levy bears to the total.
37-36	Jan 31	Hon. Charles A.	WITHDRAWN

		Haskins	
37-36	Mar 10	SALARY. ROAD OVERSEER.	Recovery of back salary as road overseer.
37-36	Mar 10	TAXATION.	Supplemental opinion to opinions dated November 24, 1934 and April 13, 1935, to Walter H. Miller and Battle McCardle respectively.
37-36	June 15	TAXATION.	Delinquent taxes of cities of the fourth class.
37-36	Aug 18	SCHOOLS.	School districts are exempt from purchasing state automobile tags.
37-36	Oct 19	JURORS.	Traveling expenses.
38-36	Feb 20	PUBLIC ADVERTISEMENTS.	Newspaper distributed gratuitously not qualified for legal publications.
38-36	Mar 24	SCHOOLS.	Fencing and athletic field is a school purpose for which a district can levy a tax within constitutional limitations.
38-36	May 23	EXTRADITION.	Member of conspiracy in Kentucky, never present in Missouri, is not a fugitive, though conspiracy was consummated in Missouri. Jurisdiction of Missouri Courts to try conspirator living in Kentucky.
38-36	Sept 30	ELECTION.	Relating to permanent registration in Sedalia.
39-36	Jan 2	CHILDREN. SCHOOLS. CHILDREN'S HOME.	Defective child if not given education by parents until such is 16 years of age, then State Home has right to cite said children and parents before the juvenile court to have said court declare such child neglected, and after declaring such child neglected the custody of said child given to Children's Home.
39-36	Jan 31	CIRCUIT CLERKS.	Have authority without court order to file papers which the statute authorizes to be filed. Must have court order authorizing filing of any other paper. The legal effect is the same whether the paper is marked filed or whether the record proper shows filing, as the important act is the delivery of the paper to the clerk.
39-36	Feb 5	STATE BOARD OF CHARITIES.	County Superintendent of Public Welfare is not authorized to administer direct relief.
39-36	Nov 21	COUNTY TREASURER AND EX OFFICIO COLLECTOR.	The incoming treasurer and ex officio collector must of necessity make up the 1937 annual "delinquent land list."
40-36	Jan 15	SCHOOLS.	Use of school property for purposes other than instruction to pupils is discretionary with the Board of Directors.
41-36	Mar 31	GAME AND FISH CRIMES.	(1) Territorial jurisdiction of crimes is limited to statutory and constitutional boundaries which change by "accretion" but not be

			"evulsion". (2) Netting of fish in April and May in Missouri waters is a misdemeanor.
41-36	July 16	COUNTY COLLECTOR AND COUNTY TREASURER.	Collector cannot pay taxes which he has collected to county treasurer by warrants unless such warrants were received from legal holder. Treasurer not entitled to additional compensation for handling money derived from sale of road bonds.
41-36	July 31	ELECTIONS.	Challengers at primaries have no official rights beyond the territorial limits of the committeeman or committeewoman making the appointment.
41-36	Aug 27	CONSTABLES.	Fees of a constable and deputies for attending election and erecting and tearing down election booths.
41-36	Aug 29	CRIMINAL LAW. CONCEALED WEAPONS.	One traveling on a continuous journey peacefully through the State is not prohibited from carrying a concealed weapon.
42-36	June 6	ELECTIONS. PRIMARY ELECTIONS.	Failure of County Clerk to publish notice, as required by Section 10256, R. S. 1929, of offices to be filled, does not invalidate primary election.
42-36	July 15	COUNTY BUDGET ACT.	The deficit in Class 2 relating to payment of jurors by script under Sections 8767 and 8765 may be paid out of excess funds existing at the close of the fiscal year in any other class, or may be paid out of surplus existing after all current expenses are paid, or from delinquent taxes.
42-36	Oct 12	INSPECTION OF GRAIN.	Form used by firm for inspection for its own convenience and not impersonating Grain Inspection & Weighing Department, not violation of Sec. 13362, R.S. Mo. 1929.
43-36	Jan 18	OFFICERS.	Illegal for State, County or municipal officer to accept or use pass issued by railroad company in consideration of such officer acting as local attorney.
43-36	Feb 7	COUNTY COURT.	Cannot appropriate funds for a county farm organization when the same does not legally exist.
43-36	Feb 20	RECORDER.	Recorder's fee for recording real estate deeds.
43-36	Feb 24	STATE ELEEMOSYNARY INSTITUTIONS.	(1) If county court finds patient in state hospital has not sufficient property to keep said patient as a private patient, such finding is final; (2) Father not compelled by law to maintain son in state hospital but may reimburse county if he so desires; (3) County Court cannot pay members of County Old Age Assistant Board.
43-36	May 23	TOWNSHIP OFFICERS.	Increased compensation under Section 12310, R.S. 1929, as amended Laws of Mo. 1931, page 377.

43-36	Sept 5	MARRIAGE.	Marriage between man and his niece, although valid in Austria where contracted, is void in the State of Missouri and the parties are subject to criminal prosecution if they return to live as husband and wife in Kansas City, Mo.
43-36	Oct 13	GAME & FISH. TRESPASSING.	In attempting prosecution under Sec. 8312, R.S. 1929, use of land and custom of owner regarding same should be considered. If either of three elements – "enclosed, improved or cultivated" – exist, prosecution will lie.
43-36	Dec 30	PENITENTIARY.	Officers and employees of the Missouri State Penitentiary, and superintendents of institutions under department of penal institutions are not entitled to subsistence.
45-36	Jan 7	PUBLIC OFFICERS.	Denied the right to become interacted in contracts made in their official capacity.
45-36	Jan 14	ELEEMOSYNARY BOARD. INSPECTION OF RECORDS.	Records are privileged, but if waived may be inspected by any interested party; board may make reasonable rules respecting the same. If suit is pending, the court may order inspection; subpoena duces tecum will produce records in court.
45-36	Feb 20	OSTEOPATH.	Osteopaths have legal right to participate as physicians in sanity inquest on county patients.
45-36	Feb 28	COUNTY BUDGET ACT.	Insane pauper patients not sufficiently harmful to be sent to State Hospital may be kept at County Farm and expenses therefor paid out of Class 5.
45-36	Mar 10	COURT REPORTER.	Fees for transcribing bill of exceptions in criminal cases where defendant is poor person.
45-36	Mar 11	PROBATE JUDGE.	Probate Judge acting as ex officio clerk required to give bond as such.
45-36	May 19	ELEEMOSYNARY INSTITUTIONS.	Counties must pay board of managers in cash for up-keep and support of insane poor, but the sending of a warrant or a check, if such represents cash, complies with Section 8636, R. S. 1929.
45-36	June 12	ELEEMOSYNARY INSTITUTIONS.	County patient, upon inheriting money in excess of exemptions allowed by law, must be made pay patient by order of the County Court.
45-36	July 31	APPROPRIATION.	Eleemosynary may contract for inspection of boiler in connection with its institutions, same may be paid from "Operation Fund".
45-36	Aug 8	SHERIFFS FEES.	Amount allowed for actual miles traveled.
45-36	Aug 20	TAXATION.	When American Legion is exempt from taxation.
45-36	Aug 31	Hon. W. O. Jackson	WITHDRAWN
45-36	Oct 20	ELECTIONS.	Occupants of private homes, partially supported by the county are not

			inmates of poorhouses within the meaning of the Constitution of the State of Missouri and Section 10178 R.S. Mo. 1929.
45-36	Oct 27	SOLDIERS AND SAILORS.	Can vote in St. Louis County if they can establish a legal residence, independent of the fact that they are soldiers and sailors in the regular United States Army and Navy.
46-36	Jan 29	COUNTY BUDGET ACT.	Salary of Janitor should be in Class 4. Estimate for Sup't. of County Farm should be placed in Class 5, when superintendent is not paid regular salary but receives compensation from the county court for boarding and maintaining each inmate.
46-36	Jan 29	TAXATION.	Cost of publishing delinquent list to be paid out of County Treasury.
46-36	May 7	SCHOOLS.	Use of public funds in aid of sectarian institutions void.
46-36	Dec 22	DRUGS.	A person may not use the word "drugs" in his business or advertisement unless he be a licensed pharmacist.
47-36	Jan 21	COUNTY BUDGET ACT.	Special tax levy of .07 authorized by section 7891 is not to be included in the term revenue as used in the Budget Act.
47-36	Feb 28	SCHOOL FUNDS.	Property sold to satisfy school fund mortgages, when securities are insolvent should be handled as outlined in Sec. 9256, R.S. Mo. 1929.
47-36	Dec 31	CO. SUPERINTENDENT OF SCHOOLS.	Section 9467 permits county superintendent to receive not to exceed one-fourth of the annual salary as traveling expenses and clerical hire, or not more than $3.00 for each teacher under his jurisdiction. If county Sup't. does not claim full amount as actual expenses, he cannot afterwards claim offset by county against him for alleged unlawful salary and fees. If county sup't. has not claimed all actual expenses, he may do so at any time during the year.
48-36	Mar 9	CIRCUIT CLERK.	Not entitled to retain drainage tax fees under Sec. 10879 in addition to maximum amount of fees he is entitled to retain under Sec. 11786, R.S. Mo. 1929.
48-36	Nov 25	TAXATION.	Procedure of Collector after third sale—Four propositions.
49-36	Apr 24	SCHOOL DISTRICTS.	When warrants may be issued on anticipated revenues.
49-36	July 23	COSMETOLOGY.	The Board of Health for its power to make rules and regulations governing examination of applicants can charge applicants a fee of $1.00 for the rental of equipment necessary for said examination in addition to the regular examination fee of $10.00 as provided under Section 9094, R. S. Mo. 1929.
49-36	Aug 27	SCHOOLS.	Section 9357, R. S. 1929, and Section 19, Laws of Mo. 1931, page 346, provide building aid to certain districts and allow participation in both.
49-36	Oct 10	Hon. Lloyd W. King	WITHDRAWN

49-36	Oct 20	ELECTIONS.	A person legally qualified as a voter and able to read and write may act as a judge of election (except candidate) in counties the size of Livingston County.
49-36	Nov 13	COUNTY COURTS.	Limits on borrowing money cannot exceed reasonably anticipated revenues for the year without a bond issue approved by the people.
49-36	Dec 15	SCHOOLS.	General Assembly may provide gratuitous instruction for persons under 6 years of age and also for persons over 20 years of age, and such would not violate the Constitution of Missouri.
49-36	Dec 31	SCHOOLS.	Postage may be purchased from the appropriation to teacher-training if such postage is used in the inspection and supervision of teacher-training.
50-36	July 28	OLD AGE PENSIONS.	State Board not relieved from liability to pay funeral expenses of deceased pensioner because he carried policy of insurance in the amount of $108.00 payable to his wife.
51-36	Mar 11	OLD AGE ASSISTANCE.	Applicant may appeal to the Circuit Court from the decision of the State Board as to amount of assistance allowed.
51-36	Dec 31	PENAL INSTITUTIONS.	Commissioners may not make lump sum allowances for extraordinary services performed by employee, over and above fixed salary.
52-36	Jan 8	Hon. Joseph A. Lennon	WITHDRAWN
52-36	Mar 11	Mr. A.C. Leftwich	WITHDRAWN
52-36	Mar 12	STATE BOARD OF EDUCATION.	Duly authorized agency to receive Federal Social Security Funds for health work in Mo.
53-36	Nov 13	PUBLIC ADMINISTRATOR.	Tenure of Office.
54-36	Sept 15	CITIES. PUBLIC SERVICE COMMISSION.	Public Service Commission Act supersedes any contract between city and utility as to purity of water.
56-36	Jan 20	BANKS & BANKING. CORPORATIONS.	Persons seeking to incorporate doing a safety deposit box business, must comply with the provisions of Article 5, Chapter 34, R.S. Mo. 1929.
56-36	Aug 14	CRIMINAL COSTS.	In change of venue cases, where a cause is transferred from one county to another and a defendant is convicted in the latter county and sentenced to a term in the county jail, the expense and upkeep of such prisoners shall be borne by such county from whence the cause was transferred.
56-36	Sept 30	ELECTIONS.	Right of County Central Committees to name candidates; must be

			known to be of same political faith.
56-36	Oct 15	ELECTIONS. INSANE.	Absentee ballots to be printed thirty days before election. Absentee ballots may be voted within thirty days of election. Relatives may transport to hospital and receive pay.
56-36	Oct 19	DELINQUENT TAXES.	Costs of printing.
57-36	Jan 7	COUNTY COURT.	Judges of County Court cannot borrow money personally to pay unappropriated debts of county.
57-36	Jan 20	INDIGENT PERSONS. RAILROADS. PUBLIC SERVICE COMMISSION.	Consent of the Public Service Commission obtained, railroads may issue a special rate to indigent and destitute persons who are charges of the Missouri Relief Commission, and same would not be discriminatory or unlawful.
57-36	Jan 28	SPECIAL ROAD DISTRICTS.	May spend bond money for purchase of machinery.
57-36	Jan 28	COUNTY COURTS. OLD AGE ASSISTANCE.	Old Age Assistance Board is not entitled to compensation. County Court has no authority to make donations to them, but is not liable for making such donations if made in good faith under the belief they have authority to do so.
57-36	Mar 9	CIRCUIT CLERKS-CIRCUIT COURTS.	Rule of Circuit Court receiving $10.00 filing fee in advance must not be arbitrarily enforced.
57-36	Aug 8	OFFICERS. COUNTIES.	County must furnish and pay for reasonable office expenses of county officials.
57-36	Aug 27	ELECTIONS. EXCEPTIONS.	Conviction for felony disqualifies voter until full pardon is granted. As to convicts under twenty or 18 years of age.
57-36	Aug 31	TAXATION: COUNTY COURTS.	May correct erroneous description of land. May compromise taxes only as provided for in Section 9950 as amended.
57-36	Oct 10	SPECIAL ROAD DISTRICTS. ROADS AND BRIDGES.	Special road district not liable for tort actions or if employee injured or killed while in line of duty.
57-36	Oct 15	SCHOOL FUNDS. COUNTY COURTS.	Counties not permitted to borrow moneys from school funds. County Courts must loan school funds as provided by statute.
57-36	Dec 12	INSANE PERSONS.	Notice and summons required of insane persons before judgment of insanity in County Court. Temporary incarceration of officer in insane asylum without notice or summons for hearing in County Court does not create vacancy in office of Sheriff.
58-36	Jan 2	BUILDING AND LOAN.	Conversion of building and loan associations to Federal institutions. See our opinion dated March 17, 1934.

58-36	Jan 27	TAXATION.	Property may be summarily seized and sold, by strictly following the statute, in payment of delinquent personal property taxes.
58-36	Feb 17	BUILDING & LOAN.	By-law disapproved because it permits the loan of funds to members without the pledge of shares of stock.
58-36	Mar 13	OLD AGE PENSIONS.	Members of Old Age Assistance Board only entitled to necessary expenses actually incurred, not to exceed for board and lodging the amount fixed by Old Age Assistance Division. Not to receive over five cents per mile for using their own car.
59-36	Jan 13	PHYSICIANS. STATE BOARD OF HEALTH.	May institute proceedings to revoke license on complaint of any citizen. May institute proceedings upon information without complaint having been filed.
59-36	Jan 24	STATE BOARD OF HEALTH. PHYSICIANS AND SURGEONS.	Procedure for revocation of license.
59-36	Jan 28	COUNTY BUDGET ACT.	At close of fiscal year the county court may transfer surplus funds and pay accounts arising during the year under Sec. 12167, R.S. Mo. 1929.
59-36	Feb 10	HEALTH.	Board of Health may require by rule Director of Cosmetology and Secretary to give surety bond before entering upon discharge of their duties.
59-36	Feb 29	BOARD OF HEALTH.	State Board of Education proper State agency to receive Federal Funds for purpose of carrying out provisions of Article 1, Chapter 52, R. S. Mo. 1929.
59-36	Mar 12	AUTOMOBILES.	The owner of the car is liable for damages to a hitch-hiker provided the hitch-hiker is not guilty of contributory negligence. The owner of a car owes a hitch-hiker the same degree of care as any other person, that is, the highest degree of care.
59-36	Mar 16	CHIROPRACTORS.	May certify to death certificates.
59-36	Apr 17	COUNTY BUDGET ACT.	It is the duty of county court in counties of 50,000 population or more to adopt the budget 10 days before January 1 of each year unless terms of any judges expire, in which event appropriation and final order shall be made on or before February 1.
59-36	Apr 27	GAMBLING.	Tit-Tat-Toe Gum Vending Machines are Gambling Devices.
59-36	May 19	PHYSICIANS AND SURGEONS.	Certificate of dean of reputable medical school that an applicant has met the requirement of said school and will be issued a diploma is sufficient to permit an applicant to take the examination for a license to practice medicine.

59-36	June 9	HOTELS. TOURIST CAMPS.	Tourist Camps with ten or more guest rooms are to be inspected and licensed as hotels.
59-36	June 19	FOOD AND DRUGS.	Whether coloring added to “orange drinks” altered such is question of fact, color added to “orange drinks” unless stated on container in which sold, is misbranded.
59-36	July 28	STATE BOARD OF HEALTH. REGISTRATION OF BIRTHS AND DEATHS.	Local registrar cannot issue certified copies of birth and death certificates and charge therefor.
59-36	Sept 7	TAXATION.	Redemption of delinquent property subsequent to the second tax sale.
59-36	Sept 11	COUNTIES. CONTRACTS.	County Court cannot contract for a rock crusher when part payment must be made from the revenue of future years. If payment is contemplated out of revenue of year in which contract is made, same may be done without violating County Budget Act if sufficient funds remain in Classes 5 and 6 even though same was not included in the estimate for the fiscal year.
59-36	Nov 6	FEES. FUNDS.	Fees received by Commissioner of Health from Federal Government for transcripts relating to births and deaths must be turned into the State treasury.
59-36	Nov 27	BOARD OF HEALTH.	Legislature appropriated money for Trachoma Hospital at Rolla for salaries of employees for “Prevention of Blindness”; appropriation act unless supported by a statute is a nullity.
59-36	Dec 4	CORONER.	Bond of Coroner should be filed in the Office of the County Clerk. Same can be recorded by the Recorder of Deeds.
59-36	Dec 23	SOCIAL SECURITY.	Federal Act in relation to the Missouri Blind Pension Law.
61-36	Oct 10	ELECTIONS.	Number of Judges to a Precinct.
62-36	Aug 17	TAXATION.	Form of Collector’s Deed
62-36	Sept 23	STATUTE OF LIMITATIONS.	If officer voluntarily pays shortage of five years, he cannot demand refund for two years for the amount of shortage of two years.
62-36	Nov 19	TAXATION.	Approved form for county collector’s deed when grantee assignee.
63-36	Jan 17	BANKS AND BANKING.	Banks have authority to pledge assets to secure loans for purpose of merger or consolidation.
63-36	Feb 8	BANKS AND BANKING.	Unanimous consent of all stockholders, preferred and common, required of altered Articles of Agreement; Section 10, Article XII, Missouri Constitution; Laws of Mo. 1933, pp. 406-408.
63-36	Mar 4	EMPLOYMENT	County Court has no authority to issue warrant on county treasury for

		BUREAUS.	maintenance of the State Employment Bureau.
63-36	Apr 30	TOWNSHIP BOARDS.	Roads and bridge money may be spent on W. P.A. projects in lieu of usual maintenance demands.
63-36	June 1	HIGHWAY PATROL.	Concealed weapons subject to provisions of Section 4433 R.S. Mo. 1929, as a person.
63-36	Aug 6	COUNTIES. TOWNSHIP BOARDS.	Township Board has no authority to borrow money except by issuing bonds pursuant to the statute.
63-36	Aug 18	MOTOR VEHICLES.	Maximum gross weight that may be carried by truck with trailer attached is 48,000 pounds.
64-36	June 26	OFFICER'S QUALIFICATIONS. MUNICIPALITIES.	Assessor not entitled to qualify if owing delinquent city taxes.
64-36	Sept 23	SCHOOLS.	School of residence must pay excess over $50 of per pupil cost of its students attending high schools in other districts.
65-36	May 23	JURIES.	Federal employees exempt from jury service when?
66-36	Jan 6	INHERITANCE TAX.	Taxability of (a) life insurance; (b) Insurance trusts; (c) annuity contracts.
66-36	Feb 27	INHERITANCE TAX.	Intangible property, including stocks, bonds, notes etc., physically located in the State of Missouri and owned by a foreign subject or by a non-resident domiciled in a foreign country, is subject to the inheritance tax laws of the State of Mo.
66-36	Mar 4	OLD AGE ASSISTANCE.	5% grant from Federal Government under Sec. 3a of Federal Act may be applied for administration expenses in the same proportion as funds applied in State Appropriation Act.
66-36	Aug 27	COLLECTORS.	Allowance for deputy hire cannot be retained by collector.
66-36	Sept 18	COURTS. INDUSTRIAL HOME FOR GIRLS.	Court may designate any woman to accompany a delinquent girl to State Industrial Home for Girls.
66-36	Oct 7	Hon. Richard R. Nacy	WITHDRAWN
66-36	Dec 10	APPROPRIATIONS.	Section 44a of Article IV of the Constitution constitutes appropriation for payment of interest on road bonds irrespective of legislative action.
67-36	May 29	Hon. Vincent D. Nicholson	WITHDRAWN
67-36	July 30	CHATTEL MORTGAGES. NOTICE.	Chattel mortgages on unplanted crops are equitable liens. If mortgagee is in possession, his rights are superior to third parties. (Cases distinguished.)

68-36	Feb 14	COUNTY CLERK.	8 questions relating to fees.
68-36	Feb 28		Letter to Hon. R.E. O'Malley
68-36	Mar 7	SCHOOLS.	Expenditures for furnishing and repairing school building is for school purposes; taxpayer only has right to question levy for legality; and other questions.
68-36	Mar 23		Letter to Hon. R.E. O'Malley
68-36	Apr 9	BANKS AND BANKING.	(1) A corporation has no other powers than such as are conferred on it by the sovereign creating it, or such as may be fairly implied from those expressly given; (2) A bank incorporated in Missouri has no power to engage in the business of writing insurance; (3) Trust companies incorporated under the laws of the State of Missouri may engage in the business of writing insurance as agent or as broker; (4) Remedies.
68-36	Apr 20	INSURANCE.	Letter to Hon. R.E. O'Malley
68-36	May 11	SCHOOLS.	(1) Warrants may be issued only against the income and revenue of the current year, which includes back taxes which have no warrants against them. (2) What constitutes income and revenue; (3) Who can stop payment on warrants?
68-36	May 29	PENAL INSTITUTIONS.	Void orders of a Court have no legal force in determining the place of imprisonment.
68-36	July 1	INSURANCE DEPARTMENT.	Approval of Declaration and Articles of Association of Cooperative Casualty Co.
68-36	July 21	INSURANCE DEPARTMENT.	Mutual Life Insurance Co. incorporation papers approved.
68-36	July 25	RESIDENCE.	(1) Person's residence is a matter of intention to be determined by such person's acts and utterances; (2) City of St. Louis cannot return persons requiring institutional care to alleged legal residence when such person has evidenced an intention by acts and utterances to become a resident of the City of St. Louis.
68-36	July 29	INSURANCE DEPARTMENT.	Approval of Incorporation papers – Central Surety Fire Corporation.
68-36	Aug 13		Letter to Hon. R.E. O'Malley
68-36	Aug 14	INSURANCE.	Joint stock companies doing business under Sec. 5793, R.S. Mo. 1929 may not issue participating policies.

68-36	Aug 21	PEDDLERS.	1. Whoever shall deal in the selling of goods, wares and merchandise and go about from place to place to sell same is a peddler. 2. Drivers of trucks used in the dealing and selling of goods, wares and merchandise shall be licensed as peddlers. 3. No 2 or more persons shall deal or sell goods etc. under same license.
68-36	Nov 28	SUPERINTENDENT OF INSURANCE.	Fees of Referee as set forth in Section 5945, Laws of Mo. 1933, p. 65 are the only fees that can be allowed the Referee, and the statute cannot be waived.
68-36	Dec 16	SALARIES. FEES. COUNTY CLERKS.	County Clerks shall account for all fees except two, and only receive salary fixed by 1933 Act.
68-36	Dec 16	DEAD BODIES.	Schools and colleges within this state now incorporated, or hereinafter incorporated, teaching descriptive anatomy are entitled to receive dead bodies when complying with the provisions of Article 3, of Chapter 53, of R.S. Mo. 1929.
68-36	Dec 31	APPOINTMENTS.	What constitutes a new appointment within the meaning of Section 9636 R.S. Mo. 1929.
69-36	Mar 18	GOVERNOR.	Cannot offer reward under Sec. 3589, R.S. Mo. 1929 unless some person be charged with a felony or convicted of a felony and flee from justice.
69-36	Mar 25	SURVEYORS. COUNTY OFFICERS.	Removal from county no disqualification for office under Section 11571, R.S. 1929.
69-36	Apr 20	COUNTY SUPERINTENDENT OF SCHOOLS. TEACHERS' EXAMINATION FEES.	Blanks and records to be supplied by whom; Budget of County Supt – how it can be spent. For what fees are to be used.
69-36	Dec 16	CORONERS. DEAD BODIES.	Coroners are required, whenever they have in their custody the body of a deceased person to be buried at public expense, to communicate with the secretary of the Anatomical Board for disposition of said body.
70-36	Jan 30	TAXATION.	Payment of costs of printing delinquent lists.
70-36	Mar 6	COUNTY CLERK. COUNTY WARRANTS.	Fee of 25 cents allowed to county clerk under Sec. 9955, Laws of Mo. 1933, p. 436, is an accountable fee. Under Sec. 9911, R.S. Mo. 1929 warrants of current year may be accepted in payment of beer and liquor licenses.
70-36	Mar 10	SALES TAX.	Receipts from operation of school bus not subject to tax; Funds derived from service charges to members of a mutual telephone company are

			subject to tax.
70-36	Mar 17	COUNTY COURTS.	Contingent liability is not a debt within the meaning of the constitutional inhibition against county indebtedness. County Court may contract same regardless of constitutional provision.
70-36	Dec 17	TAXATION.	Owner of undivided interest may redeem entire tract from sale.
71-36	Apr 7		Approval of Articles of Association of the Group Hospital Service Inc.
71-36	Aug 19	COUNTY COURT.	County Court may purchase certificates of purchase on delinquent tax lands if it desires to take that means of purchasing property for the use and benefit of the county.
71-36	Oct 2	CRIMINAL LAW.	A judgment and sentence cannot be modified or changed after a term of court has adjourned – only recourse for boy under 17 years of age receiving sentence to penitentiary or Algoa Farms is pardon, parole, reprieve or commutation by the Governor or by writ of habeas corpus.
71-36	Oct 23	CITIES. HIGHWAYS.	Special road and bridge funds may be spent by county within cities under certain conditions but cities not entitled to require it.
71-36	Nov 30	COUNTY COURTS.	Not authorized to levy more than 40 cents for county purposes, as provided by the Constitution, absent a vote of the people.
72-36	Apr 6	SPECIAL ROAD DISTRICTS.	May demand taxes derived from property within district immediately after formation is completed, but cannot receive taxes for fiscal year prior to formation.
72-36	Aug 22	CITIES. SPECIAL ELECTIONS.	Cities of fourth class shall fill vacancy in elective offices by special election, by giving at least 10 days' notice thereof by publication in some newspaper published in city, or at least 20 handbills posted up at as many public places within city.
72-36	Oct 20	Mr. George Priest	WITHDRAWN
72-36	Nov 30	ADMINISTRATION.	Title passes to widow on order of Probate Court refusing letters of administration, and she is authorized thereby to sue.
72-36	Dec 29	ELECTIONS.	Fees: Messenger entitled to 5 cents mile round trip in delivering election returns to Secretary of State.
73-36	Apr 14	PROSECUTING ATTORNEYS.	May retain as own fees provided in Section 7887, R. S. Mo. 1929, in addition to salary.
73-36	May 28	COUNTY SURVEYOR.	County surveyor may only charge persons for whom he makes surveys the legal fees specified in Section 11803, R.S. Mo. 1929.
74-36	Mar 9	SHERIFFS. PEACE OFFICERS.	Liable personally on official bond for negligence in performing duty.
75-36	Jan 2	SALE OF DELINQUENT	When surplus exists from sale of land for taxes, Collector may pay

		PROPERTY.	same to person legally entitled thereto; if two parties claim same, collector shall pay it to the County Treasury and county court may determine claims and pay to proper person any time within 20 years.
75-36	Feb 21	DENTAL BOARD.	Application and fee for reinstatement of certificate of registration.
75-36	July 24	Mr. T. C. Richards	WITHDRAWN
75-36	Sept 3	DRAINAGE DISTRICTS. TAXATION.	(1) Lien for drainage district taxes does not become extinguished until deed is delivered; (2) Purchaser of land conveyed under Sec. 9957a, Laws of Mo. 1933, p. 438, does not acquire title free from future levy of drainage district taxes because of unused and unlevied benefits; (3) Drainage district may redeem land sold for delinquent state or county taxes to protect their interest Sec. 10766, R. S. 1929.
76-36	Feb 18	TAXATION.	Maximum penalty interest collectible on delinquent personal and real estate taxes.
76-36	Mar 11	SHERIFFS.	Sheriff's mileage fee for taking committed prisoner from one place to another within Clay County.
76-36	Mar 20	COUNTY FINANCIAL STATEMENT. TAXATION.	It is mandatory on county court to print the annual financial statement. It is duty of county court to pay a newspaper not to exceed $1.00 for each description printed for sales of delinquent lands unless there is a printed contract.
76-36	June 8	RECORDER.	Duty and method of recording "Waiver of Priority Mortgage", not operating as a full release of mortgage.
76-36	Sept 17	RESETTLEMENT ADMINISTRATION.	Soil Conservation: Linn Co. Soil Conservation Association may incorporate under Secs. 12676-12705 by complying with terms of said statutes and then engage in production and distribution of agricultural lime stone.
76-36	Nov 11	BONDS.	Deputy constable forbidden to sign official bond as surety.
76-36	Dec 16	PROSECUTING ATTORNEY'S SALARY. SALARIES. DECLARATORY JUDGEMENT ACT CONSIDERED.	Salary and judgment for salary not binding where no notice given to an adverse party.
77-36	Jan 3	TAXATION.	Tax sale under execution to highest bidder—costs to be first paid.
77-36	Feb 5	BLIND PERSONS.	Missouri Commission for the Blind cannot expend money, for removal of physical ailments preparatory to eye operations, from its appropriations.

77-36	June 9	ELECTIONS. PRIMARY.	Not necessary to print ballots for Socialist and Socialist Labor parties in City of St. Louis, where there are no contests; having cast less than 5% at last election for Governor.
77-36	Oct 16	SALE OF DELINQUENT LANDS.	Provisions of Sec. 9952b, Laws of Mo. 1935, p. 403 are mandatory.
78-36	Jan 17	COUNTY TREASURER.	Cannot claim commission on school funds as provided in Sect. 9266, R.S. 1929 if funds of consolidated school district are paid direct to the treasurer of the district as provided in Sec. 9340, R.S. 1929.
78-36	Jan 20	PENAL INSTITUTIONS.	Imprisonment pursuant to the jury's verdict for robbery by means of a deadly weapon is not legally increased under the provisions of section 4428 R. S. Mo. 1929.
78-36	Mar 17	STATE BARBER BOARD.	Payment of $2.00 per year entitles barber to annual license.
78-36	Aug 13	ELECTIONS.	Party cannot become an independent candidate for sheriff without complying with Section 10241, R.S. 1929.
78-36	Aug 26	ELECTIONS.	Interpretation of Section 10241, Revised Statutes Missouri 1929.
78-36	Sept 17	OFFICERS. SOLDIERS.	The personal and real property of members of the R. O. T. C. is subject to taxation in this State.
79-36	Jan 22	PUBLIC OFFICERS.	County Surveyor cannot hold office of County Administrator of W. P. A.
79-36	Sept 17	SALES TAX.	Sales made by stationery store of St. Louis University not subject to taxation.
81-36	May 11	MORTGAGES AND DEEDS OF TRUST.	If securing a series of over $100,000, may be released without production or notes under Section 3083, Laws. Mo. 1933, p. 194.
81-36	July 24	RECORDER.	In cities of 600,000 inhabitants or more, and in adjoining counties, the recorder shall identify and stamp notes or bonds secured if lien is intended to be created on real estate.
81-36	Aug 19	COUNTY WARRANTS.	Under County Budget Act counties can protest warrants.
83-36	Jan 2	TAXATION.	Surplus of proceeds of tax sale to be paid only after order of County Court.
83-36	Jan 6	FEES. COMPENSATION. CIRCUIT JUDGES.	Per diem compensation of Circuit Judges when trying cases in another Circuit.
83-36	Jan 17	BARBER BOARD.	Undesirables can be eliminated from the profession by health and sanitation rules promulgated by the Board.
83-36	Jan 17	Hon. Forrest Smith	WITHDRAWN

83-36	Jan 18	STATE BOARD OF ACCOUNTANCY.	Subject to the terms of Sec. 1 Laws of Mo. 1933, p. 416, relating to boards, bureaus and commissions paying all fees into the State Treasury.
83-36	Jan 20	SHERIFF FEES.	Not entitled to $1.25 per day for prisoners committed to jail upon default of bond to await preliminary.
83-36	Feb 10	MOTOR VEHICLE LAW-CRIMES.	Crime of operating a motor vehicle in a reckless manner.
83-36	Feb 11	ROADS & BRIDGES.	Special Road Districts has exclusive supervision over roads within its district, to the exclusion of the county highway engineer; tools and machinery belonging to special road district also excludes right of supervision of county highway engineer.
83-36	Mar 27	APPROPRIATIONS.	$1680 of Appropriation Act of 1935 to State Service Officer invalid and void because of conflict with Sec. 4 of Act creating office of State Service Officer (Laws of Mo. 1931, p. 263)
83-36	Mar 28	BOARD OF FUND COMMISSIONERS. PUBLIC SCHOOL FUND.	Not authorized to invest public school fund. To be invested at direction of State Board of Education.
83-36	Mar 28	Hon. Forrest Smith	WITHDRAWN
83-36	Apr 2	APPROPRIATIONS.	Claim filed by St. Louis Training School for Feeble-minded cannot be allowed by the Board of Eleemosynary Institutions and audited by the State Auditor.
83-36	Apr 21	OLD AGE PENSION.	Accrued assistance due an old age pensioner at the time of his death, to whom paid.
83-36	Apr 24	PROSECUTING ATTORNEY.	Prosecuting attorney allowed reimbursement for necessary stenographic and clerical help from County, in reasonable and necessary amounts.
83-36	Apr 29	SUPERINTENDENT OF SCHOOLS, COUNTY. SCHOOLS.	Expenses for telephone of County Superintendent of Schools not payable out of funds under Section 9475.
83-36	Apr 30	CRIMINAL COSTS.	When defendant is insolvent and continuance is granted at his instance and defendant is later acquitted, the State is liable for costs; when state receives continuance at its cost and defendant is convicted and unable to pay costs, State is only liable for costs incurred by it.
83-36	May 11	TAXATION. COUNTIES.	Property owned by a county located in another county is exempt from taxation.
83-36	May 27	SCHOOLS.	A school district may lawfully enter into a contract with another district

			to transport its pupils and pay the difference between what the State actually pays and the amount stated in Section 16a, Laws Mo. 1935, p. 352.
83-36	June 11	INHERITANCE TAX.	An inheritance tax may be assessed even though the property be subject to escheat.
83-36	June 15	CITIES OF THE FOURTH CLASS.	Collector elected to fill vacancy holds office for full period of vacancy.
83-36	June 16	LIQUOR CONTROL ACT. APPROPRIATIONS.	State liquor stamps cannot be paid for out of money appropriated to the Liquor Department for general operating expenses.
83-36	July 15	CITIES. SALES TAX.	Cities of third class cannot pass sales tax act by ordinance. Cities of third class can enact ordinance placing license for occupation tax on businesses, according to the volume of business carried on.
83-36	Aug 6	COUNTY TREASURER. OFFICERS.	Not entitled to commission of not exceeding one per cent under Section 2904, R. S. 1929, for Funding Bonds.
83-36	Sept 23	WORKMEN'S COMPENSATION INSURANCE.	State and other political subdivision may accept provisions of this chapter for the purpose of complying with requirements of the Resettlement Administration.
83-36	Nov 14	TAXATION. BOND.	Bond of County Treasurers, ex-officio county collectors. County Collectors.
83-36	Dec 14	SHERIFF'S FEES. MILEAGE FEES.	Fees received by sheriff for mileage must be accounted for under Section 11828, R. S. 1929. Sections 11791, 11792, 11793, 11828 and 8357, R. S. 1929, construed as to "mileage."
84-36	July 31	ELECTIONS.	Voters may take sample ballots to election booths.
84-36	Aug 25	SCHOOLS.	All applicants for a third grade certificate must present evidence of having completed four years of high school work or its equivalent.
85-36	Jan 16	MOTOR VEHICLES.	A motor vehicle used to transport other motor vehicles would have to be registered and have license plates designed and provided for "commercial motor vehicles" as defined.
85-36	May 14	COUNTY COLLECTORS.	Taxes locally assessed against electric power and light company to be included in the matter of taxes locally assessed, for the purpose of determining collector's commission.
85-36	Oct 9	TITLE.	1. Officers and members of the Missouri State Highway Patrol are civil officers. 2. Regimental adjutants permanently on military duty and drawing regular salaries from the state are not entitled to draw additional compensation for attendance at regimental schools.

85-36	Dec 31	COUNTY BUDGET ACT.	County Treasurer can meet December, 1936, accounts if he has the money on hand.
86-36	Jan 24	GAMBLING DEVICES.	Who has right to money in seized slot machines?
86-36	Jan 29	MOTOR VEHICLES.	State employees and employees of counties and municipalities not required to register as "chauffeurs" defined by Section 7759, R. S. 1929.
86-36	Jan 29	HIGHWAY DEPARTMENT. LEVEES.	Sections 10991 and 11014, R. S. 1929, have reference to State built levees. Prosecutions for government built levees under Federal law.
86-36	Feb 11	OUSTER PROCEEDINGS.	Civil procedure applies to service of summons.
86-36	Mar 4	MONOPOLIES. CORPORATIONS.	Any contract, agreement or arrangement made with intent to create or maintain a monopoly, contrary to the provisions of Chapter 47, R. S. 1929.
86-36	Apr 14	CITIES.	Cities of the fourth class have a right to issue bonds for the purpose of building a municipal auditorium when the assent of two-thirds of the legal voters of such city voting at an election held for that purpose have assented thereto.
86-36	July 2	BOARD OF TRUSTEES.	Woman may qualify as a member of the Board of Trustees of the Confederate Home of Missouri.
86-36	July 28	ELECTIONS.	Power to pass on right of person elected to State House of Representatives to be seated therein.
86-36	Sept 17	CIRCUIT CLERK. RECORDER OF DEEDS.	Salary determined by Sec. 11786, Laws 1933, p. 369. Population of Marion County, even though it contains Court of Common Pleas, in which there is a Clerk, is determined by the entire population of the County. Compensation is amount of fees as set forth in Sec. 11804, R.S. Mo. 1929 and the limitation of the amount of fees he may retain is Sec. 11828, R.S. Mo. 1929.
87-36	Dec 16	Hon. O. R. Sutton	WITHDRAWN
88-36	Oct 1	ELECTION.	Publication of general election notice in two newspapers in each county.
89-36	Jan 9	RECORDER'S FEES.	Circuit Clerk and Ex-officio Recorder shall pay excess fees quarterly to county treasurer.
89-36	May 8	HIGHWAY.	Abutting owner can build drain along unused part of highway.
89-36	July 6		It is the duty of the State Old Age Assistance Board to obtain as much benefit as possible from the Federal Government and not to pay

			retroactive claims.
89-36	Sept 28	NEPOTISM.	Public officer receiving personal service from daughter does not violate Section 13, Article XIV, where daughter is not appointed to an official position.
89-36	Oct 17	DRAINAGE DISTRICTS. TAXATION.	County Court without authority to abate penalties. County Court without authority to abate drainage tax penalties.
89-36	Dec 10	OLD AGE ASSISTANCE. COUNTY COURTS.	County Courts do not have authority to contribute to the support of an association of Old Age Assistance Boards.
93-36	Sept 24	ELECTIONS.	Judges of election should be selected or approved by entire central county committee.
94-36	Jan 23	COUNTY COURT.	Cannot make gift to deputy sheriff injured in line of duty.
94-36	Mar 5	COUNTY WARRANTS.	(1) County officer is not permitted to buy or speculate in county warrants of any class. (2) County officer is entitled to interest on county warrant from date of presentation to date of payment; (3) County officer cannot have warrants issued to him, protested to himself and mail his check or cash to state hospital; (4) Accounts for patients in state hospitals are paid by warrants made out to treasurer of hospital.
94-36	Mar 10	TAXATION.	Right of possession and rent to redemption period.
94-36	Sept 25	OFFICERS.	A person holding a civil office may also at the same time hold a military office within this State, and receive compensation from the State from both offices.
95-36	Mar 26	CIRCUIT CLERK.	Entitled to change of venue fees from other counties in addition to salary, same being non-accountable fees.
95-36	Sept 4	COLLECTORS. COUNTY COURTS.	Collector is required to advertise land for sale for collection of delinquent taxes, and County Court cannot legally justify failure to do so.
97-36	Jan 2	OFFICIAL BONDS.	Members of the State Tax Commission required to give bond in the amount of $10,000 and payment for premium for a surety one cannot be paid out of appropriations to Tax Commission for operation.
97-36	Feb 1	Hon. F. D. Wilkins	WITHDRAWN
97-36	Mar 6	CITIES THIRD CLASS.	Persons who are in arrears for unpaid city taxes at the time the polls closed on election day are ineligible to hold office.
97-36	May 21	Hon. Amos Wight	WITHDRAWN

97-36	May 28	ELECTIONS.	A person might file a declaration for committeeman or committeewoman and a further declaration for public office.
97-36	June 18	COUNTY BUDGET ACT.	County Treasurer is liable on his bond under Sec. 8 of Act if warrants are paid out contrary to terms of Act, but is not liable if warrant is regular and he has no knowledge of fraud in connection therewith; City of third class may use excess funds without an election for the repairing of a sewer.
97-36	July 17	TAXATION. ASSESSMENT.	Personal property assessable in name of administrator where owner died after first of June and before assessment.
97-36	July 28	INTOXICATING LIQUOR.	City may not prohibit sale of intoxicating liquor within a distance greater than 300 feet of a school or church.
97-36	Aug 18	TAXATION.	Merchant pays ad valorem tax on the highest amount of property owned, possessed or controlled from March until June.
97-36	Sept 21	ASSESSORS.	Not entitled to charge for list of each stockholder in a bank, but can charge for only one bank list.
97-36	Oct 31	Hon. Charles P. Williams	WITHDRAWN
97-36	Dec 16	TOWNSHIP ORGANIZATION. TAXATION. POLL TAXES.	Re levying of poll taxes in counties under township organization.
99-36	Feb 17	SHERIFFS.	Sheriff can succeed himself in office when?
99-36	Feb 18	COUNTY SUPERINTENDENT OF SCHOOLS.	It is the duty of the county superintendent of schools to investigate school loans; said investigation being for the purpose of ascertaining if the county court complies with the statutes in loaning school moneys.
99-36	Feb 20	COUNTY BUDGET ACT.	Contracts arising in counties of more than 50,000 to be paid out of special road and bridge levy fund are required to be advertised or notices published under Sec. 19, Laws of Mo. 1933, p. 350 if amount is more than $500.00.
99-36	May 19	CORONERS.	Not eligible to said office for over four years continuously in any period of time.
100-36	June 12	PRIMARY ELECTIONS.	Candidate who has paid filing fee to Treasurer of Central Committee and filed timely declaration is entitled to have his name printed on the official ballot, but Treasurer of Central Committee should transfer fee to County Treasurer.
100-36	Aug 28	SPECIAL ROAD DISTRICT.	Prosecuting Attorney is not required to represent special road districts.

...s: Is mandatory upon the board of directors to pay high school tuition, and voters cannot vote not to pay same.

February 25, 1936.

2-25

FILED
1

Mrs. Mary H. Acuff
County Superintendent Public Schools
Paris, Missouri

Dear Madam:

This is to acknowledge your letter as follows:

> "Can a school district discontinue paying High School tuition by voting against it at the school election?"

Section 16, Laws of Missouri, 1935, page 351, relates to the payment of high school tuition. Note the provision of said section:

> "The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; * * "

The above statute is mandatory upon the board of directors and when the conditions occur as prescribed in said section, then the board has no alternative other than to pay the tuition. The voters of the district cannot, in our opinion, by vote relieve the directors of the duty imposed upon them by said section to pay the tuition of pupils attending an approved high school. However, the board of directors is limited as to the amount of tuition it can pay. Note the further provision of said section:

> "but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, * * * * * * * * * but no school shall be required to admit any pupil, nor shall any school be denied the right to collect tuition from a pupil, parent, or guardian, if the same is not paid in full as herein before provided. In no case, however, shall the amount collected from a pupil, parent, or guardian exceed the difference between fifty dollars and the per-pupil amount actually paid by the state, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per-pupil cost of maintaining the school attended is greater than fifty dollars."

You will note from the above that the school of residence is only required to pay tuition over and above the fifty dollars which is to be paid by the state,and if the state does not pay same such to be collected from the pupil, parent or guardian.

From the above it is our opinion that a school district cannot by vote dispense with the payment of tuition for resident pupils attending high school in adjoining districts, as Section 16, supra, makes it mandatory upon the board of directors to pay same.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

TAXATION: When property of a corporation is exempt from taxation on the ground that it is devoted exclusively to religious and educational purposes.

June 10, 1936.

6-11

FILED

Hon. E. W. Allison,
Prosecuting Attorney,
Phelps County,
Rolla, Missouri.

Re: Order of Cardinal Mercier of Rolla, Missouri, a corporation.

Dear Sir:

We wish to acknowledge your recent letter and enclosed articles of association requesting an official opinion relative to whether or not the real estate or any other property owned by the above captioned corporation is subject to taxation, and regret that, due to the pressure of State business, we have been unable to give you a more prompt reply.

In an opinion rendered by this department under date of June 22, 1934, to Mr. Edward Schlichter, Secretary of Salisbury Lodge I. O. O. F., a copy of which we are enclosing, we held that the test for determining whether a building is subject to taxation was not the number of good purposes to which a building may be put, nor the amount of good derived by the general public in the operation of such purposes, but whether the building is used exclusively for religious, educational or charitable purposes. If it is used for one or more commercial purposes, it is not exclusively used for the exempted purposes and is subject to taxation. This test is applicable in the case of the above mentioned corporation.

The opinion rendered to Mr. Schlichter deals only with real property and not with respect to "any other property". The court in the case of The City of Kansas v. The Kansas City Medical College, 111 Mo. 141, l. c. 145, makes the following statement with respect to exemption of personal property from taxation where same is used exclusively for religious worship, for schools, or for purposes purely charitable:

> "As will be readily seen, the only question arising upon this record is whether the furniture and appliances used by the

defendant in its medical college are subject to taxation. The question is restricted to the personal property of the defendant so used.

"It is conceded that the lot and buildings used for the college are exempt by the general law of the state, but the contention of the city is that the constitution and statute alike limit the exemption to 'the lot with the buildings thereon,' and does not extend to the personal property. Whereas, the defendant claims that the exemption extends to, and was intended to extent to, 'whatever property is proper and necessary for said school and to the enjoyment and management of said college.'

"By section 6 of article 10 of the constitution, the legislature is authorized to pass a general law exempting from taxation 'lots in incorporated cities or towns * * * to the extent of one acre, and lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon * * * when the same are used * * * for schools.' The legislature, in pursuance of this grant, by section 7504, Revised Statutes, 1889, has made the exemption just as broad as the constitution has empowered it to do.

"Section 7 of article 10 of the constitution provides that 'all laws exempting property from taxation other than the property enumerated in section 6 of the same article shall be void.' So that it only remains for us to determine whether the words, 'the lot with the buildings thereon,' can be construed to include the personal property used in the building and not a part of the realty in law. We are very clear that they do not.

"The evident purpose was to exempt a certain amount of real estate. This is obvious from the immediate context. In the next succeeding clause the exemption of agricultural and horticultural property is extended to both real and personal property. Neither the language of the exemption, nor the provisions in pari materia will, in our opinion, admit of any other construction than that we have given it. The purpose is clear to limit the exemption to real estate and to a definite amount."

From an examination of the enclosed articles of association, we are of the opinion that the real property of the above captioned corporation is exempt from taxation if same is used exclusively for religious or educational purposes, and if such realty comprises "lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon" (Article X, Section 6, of the Missouri Constitution, and Section 9743, R. S. Mo. 1929).

We are of the opinion that the personal property of such corporation is not exempt from taxation.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

ELECTIONS: Candidate for ward registrar who withdrew verbally the day before election, whose name was not taken off the ballot but subsequently received the most votes, is the legal nominee and if he does not desire to accept the nomination the Co. Committee can fill the vacancy as provided in Sec. 10268, R.S. 1929.

When 2 candidates for constable receive same number of votes, nominee should be determined by lot by canvassers.

August 12, 1936.

8-14
FILED

Honorable H.D. Allison,
County Clerk,
Buchanan County,
St. Joseph, Missouri.

Dear Sir:

This department is in receipt of your letter of August 8 regarding the election of a party for the office of registrar who withdrew verbally from the race the day preceding the election and inquiring in regard to the Constable's race in Bloomington Township. Your first question is as follows:

> "Two parties here filed for registrar of the second ward. On Monday, the 3rd, the day before election, one of the parties came into our office and withdrew. We informed him that it was too late for his name to be taken off the ballot due to the fact that they were already printed and ready to be delivered.
>
> "We did not have him sign a written withdrawal due to the fact that we have been unable to find any law that necessitates a written withdrawal, neither has our prosecuting attorney been able to find a law covering this. On all other withdrawals, however, we have written statements to that effect. Due to the fact that it was late in the afternoon on the day before the election and there were so many details to be settled, we neglected to have him sign a written withdrawal that we had been using as a measure of precaution. The man who withdrew did so verbally and he does not deny the fact that he came into our office and withdrew. He is not attempting to place our office in an embarrassing position by saying that he did not withdraw but instead has repeated that if it

went so far as to go into court, he would testify that he had told us that he withdrew.

"On the day of election the man that withdrew received more votes than his opponent and now he claims that he was legally elected. Our office, taking him at his word on the night of election, did not call his name or talley his votes. The other party claims that after reading in the newspaper on election morning, our notice of his withdrawal, that she ceased campaigning because of having no opposition and she feels that she should be the nominee.

"We would like to know which one is legally nominated. I neglected to say that we notified the newspaper of his withdrawal and it was published in the paper on Tuesday, the morning of the election. Will you please give us a decision on this matter at your very earliest convenience as you can realize the importance of settling this question as soon as possible?"

In withdrawing, the candidate for the office of registrar should have complied with the terms of Section 10251, R.S. Mo. 1929, which is as follows:

"But the secretary of state shall not certify the name of a candidate whose certificate of nomination shall have been filed in his office, who shall have notified him in writing, signed and executed with the formalities prescribed for the execution of an instrument affecting real estate to entitle it to record, that he will not accept the nomination contained in the certificate of nomination. The clerk of the county court shall not include in the publication to be made according to section 10249 the name of any candidate whose certificate of nomination shall have been filed in his office who shall have notified him in like manner that he will not accept the nomination. The names of such candidates shall not

> be included in the names of the candidates to be printed in the ballots as hereinafter provided."

For the reason that the statute directs that the candidate shall notify the County Clerk, in writing, signed and executed with the formalities prescribed for the execution of an instrument affecting real estate to entitle it to record, we are of the opinion that the candidate did not legally withdraw his name. If he now desires to be the nominee, we think he is entitled to be the same under the provisions of Section 10275, R.S. Mo. 1929, which is as follows:

> "The person receiving the greatest number of votes at a primary as the candidate of a party for an office shall be the candidate of that party for such office, and his name as such candidate shall be placed on the official ballot at the following election."

In the event he does not desire or will not accept the nomination, the County Committee can fill the vacancy as provided in Section 10268, R.S. Mo. 1929, which is as follows:

> "Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

II

Your second question is:

> "We also have another case that I would like some information on. We have in the Constable's race in Bloomington Township a tie; each candidate received 169 votes. One of the candidates is the incumbent. Will you tell us how to proceed in this case?"

In the case of the two candidates for the office of Constable who each received 169 votes, you are referred to Section 10274, R.S. Mo. 1929, in which the duties of the officers and the canvassers are set forth. Said section provides:

> "The county canvass of the returns of a primary shall be made by the same officers, and in the manner as now provided by law, for the canvass of returns of a November election. The canvassers shall meet and canvass such returns at ten o'clock on the Friday following the primary. Their returns shall contain the whole number of votes cast for each candidate of each political party, and a duplicate as to each political party shall be delivered to the county chairman of such party. The canvassers shall also make an

> additional duplicate return in the same form, showing the votes cast for each candidate not voted for wholly within the limits of the county. The county clerk shall forthwith send to the secretary of state, by registered mail, one complete copy of all returns as to such candidates, and he shall likewise send to the chairman of the state central committee of each party a duplicate copy of the returns last described relating to such candidates of each party."

Section 10285, R.S. Mo. 1929 provides:

> "In case of a tie vote, the tie shall forthwith be determined by lot by the canvassers."

CONCLUSION

It is the opinion of this department that Section 10285, supra, refers to the procedure in Section 10274, supra, and that the nominee for Constable of Bloomington Township should be determined by lot by the canvassers.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SHERIFFS--POLICE OFFICERS--FINGER-PRINTS: When the sheriff or police officer is entitled to finger-print and photograph without incurring personal liability. Admissibility of photographs and finger-prints in evidence in criminal cases.

January 10, 1936.

r13

FILED 2

Honorable C. A. Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We acknowledge your request for an opinion dated December 27, 1935, which reads as follows:

> "Several municipalities of the County of St. Louis are planning a unified bureau of identification through which the police departments will operate. They have requested an opinion from your department on the following subjects.
>
> "When is a department within its legal rights in photographing a prisoner, and when is it within its legal rights in fingerprinting a prisoner?
>
> "They wish to know if they can photograph and fingerprint anyone picked up on suspicion by the Police Department without danger of suit, and they wish to be fortified with an opinion on the matter from you."

Section 3794 R. S. Mo. 1929 provides:

> "Any person convicted of a felony, which shall not be set aside or reversed, may be subjected by or under the direction of those in whose custody he is to the measurements, processes and operations practiced under the system for the identification of criminals, commonly

> known as the Bertillon signaletic system. Such force may be used as necessary to the effectual carrying out and application of such measurements, processes and operations; and the signaletic card and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law."

Section 3795 R. S. Mo. 1929, provides:

> "No one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication shall incur any liability, civil or criminal, for anything lawfully done under the provisions of section 3794 of this article."

Section 3796 R. S. Mo. 1929, provides:

> "The enforcement of the provisions of this article by the authorities in charge of the state penitentiary, police department and others having the custody of those convicted of a felony which shall not be set aside or reversed, is hereby made mandatory."

The three above statutory provisions apply where the prisoner in custody has been convicted of a felony and said conviction has not been set aside or reversed. In cases where finger-prints and photographs are desired by police and sheriffs of one arrested who has never been convicted of felony we must look to the Constitution, Common Law and other provisions of the Statutes.

12 Corpus Juris, page 997, Section 415 reads in part as follows:

> "The police power is an attribute of sovereignty and exists without any reservation in the constitution, being founded on the duty of the state to protect its citizens and

> provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly governments, because necessary to the proper maintenance of the government and the general welfare of the community. On it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. * * * * The constitution presupposes the existence of the police power and is to be construed with reference to that fact."

12 Corpus Juris, page 908, Section 416 reads in part as follows:

> "It has been found impossible to frame, and is indeed deemed inadvisable to attempt to frame, any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it cannot extend, the courts considering it better to decide as each case arises whether the police power extends thereto, the power being coextensive with the necessities of the case and the safeguards of the public interest. Notwithstanding the impossibility of exact definition of the scope of the police power, numerous efforts have been made to define its scope in a general way. It has been said that the scope of the police power is as broad as the public welfare and that the police power is the broadest in scope of any field of governmental activity. * * * *
>
> "The police power extends to the protection of the lives, health, comfort, and quiet of all persons, and the

> protection of all property within the state. * * * *
>
> "All natural persons within the state, and all corporations doing business within the state or created thereby, hold their property and engage in their business subject to the police power of the state.* * * *
>
> "The mere fact that a law restrains the liberty of citizens of the state, or the liberty of citizens of the United States, does not render it unconstitutional.
>
> "The police power is not exhausted by being once exercised on any subject falling within its scope. The right to exercise the police power is a continuing one."

12 Corpus Juris, page 928, Section 440 reads in part as follows:

> "* * * * The fourteenth amendment to the constitution of the United States provides, 'nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law'; and thus adds to the express limitations on the power of the states. It does not deprive the states of their police power, however; and, subject to the limitations expressed therein, the states may continue to exercise their police powers as fully as before the adoption of the amendment."

Article II, Section 23 of the Missouri Constitution provides in part:

> "That no person shall be compelled to testify against himself in a criminal cause,* * * *."

Article II, Section 30 of the Missouri Constitution provides:

> "That no person shall be deprived of life, liberty or property without due process of law."

The purpose of obtaining finger-prints and photographs of persons, by the State agencies, in the exercise of police power, is for comparison of genuine photographs and finger-prints with purported likenesses. It is for the purpose of comparing the genuine with the disputed writing in order that suspected criminals may be apprehended and prosecuted. If this comparison affords a circumstance relative to the issues of a criminal cause, our Legislature has provided in Section 1751 R. S. Mo. 1929, as follows:

> "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

In the above section the Legislature presupposes that, within constitutional and common law limitations, genuine finger-prints and genuine photographs are available as evidence in a criminal cause.

On the other hand, pursuant to constitutional rights, our Legislature has provided in Section 3692 R. S. Mo. 1929, the following:

> "* * * *Provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify, * * * "

In this State compulsory incrimination is frowned upon by the Constitution, and in State v. Thomas, 250 Mo. 189, l. c. 212; 157 S. W. 330, our Supreme Court said:

> "We are aware that it is generally held that the constitutional guaranties against being compelled to testify against one's self do not apply to facts elicited by an officer through interrogatories propounded to a prisoner out of court, but we are convinced that the distinction is often more apparent than real. Both the Federal and State Constitutions are always liberally construed so as to prevent compulsory self-crimination."

Where self-incriminating evidence is voluntarily obtained from a person on trial or examination, then such evidence is properly admissible against an accused. In other words by voluntarily allowing genuine photographs and finger-prints to be taken of one's person, then that person on trial will not be heard to assert any constitutional or statutory protection that the evidence was obtained by compulsion.

In the case of State v. Sexton, 147 Mo. 89, l. c. 100; 18 S. W. 452, our Supreme Court said this about forcing evidence from an accused:

> "The testimony as to tracks being found 'in the brush' near the scene of the homicide, and that according to the dying declaration of Stark, defendant emerged from that brush when he presented the revolver and demanded Stark's money, and that the shoes of defendant fitted those tracks, was competent evidence (1 McClain's Crim. Law, section 408), and the admissibility of such evidence was not affected by the fact that two or three days had elapsed between the time of the shooting and the fitting of the shoes to the tracks; that was for the consideration of the jury; they were to give to the correspondence between the shoes and the tracks such weight as they though it to be entitled. Nor was

> the use of defendant's shoes for the purpose indicated, any violation of his constitutional rights, since he surrendered his shoes upon request of the sheriff. If they had been forced from him and then used against him, a different question might be presented not necessary to be now considered."

Involuntary self-incriminating evidence obtained from a person charged with crime is condemned by our courts and the Federal and State Constitutions are always liberally construed so as to prevent compulsory self-crimination.

The right to take a photograph and finger-print from the person of an accused, after his arrest by the officer making the arrest, and use same as evidence, is almost synonymous with the right to take papers from the person of the accused after arrest, and use same as evidence.

In the case of State v. Sharpless, 111 S. W. 69, 212 Mo. 176, l. c. 199, the Supreme Court held it proper to take papers from accused at the time of arrest, and use the same in trial against the accused. The Court said:

> "The rule applicable to this proposition is nowhere more clearly stated than in State v. Flynn, 36 N. H. 64, cited by the Massachusetts court in the quotation heretofore made. That court, speaking through Judge Bell, treated this question in this way. He said: 'It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses,

> as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. If a party should have the power to keep out of sight, or out of reach, persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence which he has been compelled to furnish against himself. It is their own. It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his.' "

There are no Missouri cases bearing exactly on the question of admissibility in evidence of photographs and finger-prints, however we call you attention to the reasoning in People v. Sallow, 165 N. Y. S. 915, which influences us in our conclusion.

In the leading case of United States v. Kelly (1932) 55 Fed. 2nd. 67, that court held that Federal police officers can legally finger-print one, at the time of his arrest, for a misdemeanor by reason of the police power that enables the State or Federal Government to use all means necessary to identify criminals and detect crime, and at l. c. 68 the court said:

> "Such means for the identification of prisoners so that they may be apprehended in the event of escape, so that second offenders may be detected for purposes of proper sentence where conviction is had, and so that

the government may be able to ascertain, as required by section 29, title 2, of the National Prohibition Act, whether the defendant has been previously convicted, are most important adjuncts of the enforcement of the criminal laws.

"Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community. * * * * The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest.

"Arrest upon probable cause and search of the person in connection with the arrest and seizure of evidences of crime have long been allowed. * * * * Yet the person arrested and thus humiliated may be entirely innocent. * * * *.

"Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification."

The above case cites cases showing that it was held lawful, though before conviction, to finger-print a person on arrest for a felony in the following states: Maryland, Indiana, Arkansas, District of Columbia, New Jersey and New York.

CONCLUSION.

Where the person arrested has been convicted of a felony and same has not been set aside or reversed, it is the duty of the police and sheriffs to photograph and finger-print the suspect, and the official does so without personal liability on his part. The Statutes above quoted are clear in such cases.

We are of the opinion that where the officer in the reasonable exercise of his police power desires to photograph and finger-print any person under arrest who is suspicioned of a felony and is being examined relative to his connection with said felony, said officer may properly do so in the performance of his duty, and violates no constitutional or personal right of the person under examination. However, discretion should be used and official authority should not be abused by inhuman and unreasonable exercise of this official authority to take photographs and finger-prints, for in such a case personal liability might attach to the officer taking the photographs and finger-prints.

There must be reasonable grounds for suspicioning a person of a felony before photographing or finger-printing him, and the mere fact that an officer encounters a stranger is not of itself grounds to suspicion him of a felony. There is no general license to officers to photograph and finger-print every person whom they arrest. There must have been a felony committed and the person arrested must understand that he is being examined relative to such felony and not on a general clean-up program where photographs and finger-prints are to be placed on record to be used in evidence in felonies which might be committed in the future. Legitimate police power is only coextensive with the necessities of the case and to properly safeguard the public interest.

We are of the further opinion that where photographs and finger-prints are obtained in the reasonable exercise of police power, they are admissible in evidence against an accused without violating any constitutional right inuring to the accused.

Respectfully submitted

APPROVED: WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN Jr.
(Acting) Attorney General.

WOS:H

ROADS & BRIDGES: Interest derived from county depositary on funds, goes to "county road and bridge funds."

2-10

February 7, 1936.

FILED
2

Honorable C. Arthur Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Anderson:

This is to acknowledge your letter dated February 3, 1936, as follows:

> "I have been requested by the treasurer of St. Louis County to obtain from you an opinion respecting several statutes that seem to be somewhat in conflict.
>
> "He has been requested by the St. Louis County Highway Engineer to transfer the interest of all funds other than the school funds to the Road and Bridge Fund, in compliance with Sec. 12186. Section 7891 sets out of course the special tax for roads and bridges and then, in addition to that, there comes in a budget law passed in 1933, giving the County Court authority to allocate funds.
>
> "I should like very much to have an opinion from you as to whether or not the interest from all funds other than school funds should be transferred as provided in Sec. 12186 to the Road and Bridge fund, in view of Sec. 7891 and the Budget Law of 1933."

We are enclosing herewith copy of an opinion rendered by this Department on November 25, 1933, to Honorable Andy W. Wilcox, State Tax Commission, relative to the disposition of

taxes levied by virtue of Section 7890 and 7891, R. S. Mo. 1929 for the "county road and bridge fund" (Sec. 7890) and the "special road and bridge fund (Sec. 7891). You will note that it is mandatory upon the county court to levy the tax provided for in Section 7890, while it is discretionary with them to levy the additional tax provided for by Section 7891.

Your inquiry concerns only Section 7891, R. S. Mo. 1929. However, in order to understand the applicability of the provisions of Section 12186, R. S. Mo. 1929, it is necessary to keep in mind the fact that there are two separate and distinct funds relating to roads and bridges, and for that reason the enclosed opinion will be of assistance.

It is also well to bear in mind the language of the Supreme Court in State ex rel. Special Road District v. Barry County, 302 Mo., l. c. 291, wherein, in interpreting Sections 7891 and 8042, it said the following:

> "Section 10818 (8042 R. S. Mo. 1929), voicing the legislative purpose with respect to special road districts, provides that all money collected 'as county taxes for road purposes, or for road and bridge purposes, by virtue of any . . . law,' upon property within a special road district, shall be set aside to the credit of such special road district. The conclusion that a special road district is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries is unavoidable. * * * * * *."

You will note that in the above case the court referred to <u>all moneys collected as taxes.</u> May it be said that <u>interest</u> received from funds derived by Section 7891 and deposited in a bank according to the provisions of Section 12186, R. S. Mo. 1929, belong to said "special road district fund?" We think not.

Section 12186, R. S. Mo. 1929, provides for a county depositary, and in part provides as follows:

> "The interest upon each fund shall be computed upon the daily balances with the depositary, and shall be payable to the county treasurer monthly who shall place the interest on the school funds to the credit of those funds respectively, and the interest on all other funds to the credit of the road and bridge fund."

Your attention is invited to the fact that only the interest on all other funds received by virtue of the depositary goes into the "road and bridge fund." Section 12186, supra, uses the words "road and bridge fund" and Section 7890, supra, uses the words "county road and bridge fund," and Section 7891, supra, uses the words "special road and bridge fund"; and the question for determination being: Into what fund should the interest received be placed? Should it be placed in the "county road and bridge fund" or the "special road and bridge fund," or should it be given to the fund from whence earned?

As heretofore pointed out, Section 7890 is mandatory and was on the statute books long before present Section 7891, and when Section 7891 was enacted, creating an additional tax for "special road districts" (Laws of Mo. 1909, p. 727), it necessitated the identifying of the two funds, which was done by designating the fund derived by virtue of Section 7890 as the "county road and bridge fund" and the fund derived by virtue of Section 7891 as the "special road and bridge fund." When Section 12186 was enacted only one fund was in existence, and that was the "road and bridge fund" and said "road and bridge fund" in existence at the time Section 12186 was enacted, is now what is termed and called the "county road and bridge fund."

Thus, we believe, in view of the historical background surrounding the enacting of the sections under discussion, that the words "road and bridge fund," used in Section 12186, should now be interpreted as "the county road and bridge fund." So that said Section 12186, in view of our interpretation, will now read "and the interest of all other funds to the credit of the county road and bridge fund."

In conclusion, it is our opinion that the interest received by virtue of Section 12186, on funds derived by Section 7891, should go into the "county road and bridge fund."

Having taken the above view of Section 12186, we deem it unnecessary to comment on the provisions of the Budget Law of 1933 (Laws of Mo., 1933, page 349, Sec. 16) as being applicable to the matter under consideration.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

JLH:EG

APPROVED:

ROY McKITTRICK
Attorney-General

ELECTIONS: JUDGES AND CLERKS: Counties of 200,000 to 400,000 inhabitants.

3-11

February 21, 1936.

FILED 2

Hon. C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Sir:

We wish to acknowledge your letter of February 10th, wherein you state as follows:

> "Will you kindly give me an opinion on the following matter:
>
> "In Section 7 of the election law found in the Session Acts of 1935, page 232, there is a provision as follows:
>
> "'Said judges and clerks shall be appointed for a term ending 60 days prior to the next general election after the registration or election at which they are appointed to serve, and shall serve as judges and clerks at all special, primary, state, county and general elections included within this act, ...'
>
> "And then reading said section in connection with Section 34, which applies to cities of 10,000 to 100,000, at page 252, the last paragraph provides, that 'All provisions regulating municipal elections in such cities or towns and all penalties provided, etc., shall remain in full force and effect as far as they are not amended or modified by this article.'

> "Will you kindly advise if, in your opinion, the judges and clerks so appointed for State and County elections called by the various municipalities under Section 34."

Your supplemental letter of February 19th is as follows:

> "Will you kindly advise supplementary to this letter, if, in your opinion, under the law it is necessary for reappointment of election judges and clerks who are now holding commissions under Central Township, which you know, has now been divided into three townships, namely - Normandy, Clayton and Jefferson townships."

I.

Section 7 of the Session Acts of 1935, page 232, provides the length of the term of judges and clerks appointed to serve in the registration of voters and the holding of elections in all counties of two hundred thousand to four hundred thousand inhabitants, and reads in part as follows:

> "Said judges and clerks shall be appointed for a term ending sixty days prior to the next general election after the registration or election at which they are appointed to serve, and shall serve as judges and clerks at all special, primary, state, county and general elections included within this act, * * *".

The above section provides that the judges and clerks shall serve as judges and clerks at all special, primary, state, county and general elections, so it is reasonable to conclude that the Legislature did not intend that they serve in municipal elections for, as stated by the court in the case of State v. Sweaney, 195 S. W. (Mo.) 714, l. c. 716:

"To so hold would be to violate the well-known canon of statutory construction, viz. that the expression of one thing is the exclusion of another."

Section 34, page 252, of the above Session Acts applies to cities of ten thousand to one hundred thousand inhabitants, and provides as follows:

"In all cities and towns in such county having a population of not less than 10,000 nor more than 100,000 inhabitants, the provisions of this article shall apply as regards to permanent registration, new registration, transfers of registration, suspension and cancellation of registration, canvass and revision of the registry, provided that in all special elections, or elections to fill vacancies, the registration books of the last preceding registration corrected by new and transferred registration, suspensions and cancellations may be used. For the purpose of ascertaining the population of any such city or town, the last United States decennial census shall determine the number of its inhabitants, except in the case of such cities or towns where a later official census authorized by state law was taken, when the result of said municipal census shall determine the number of such inhabitants for the purposes of this act. No person shall be permitted to vote in any municipal election held in such cities or towns included in the provisions of this act, whose name is not duly registered in the registration books of the precinct in which he or she resides and the precinct boundaries established by the board of election commissioners of counties included in the provisions of this act shall not be altered by the governing bodies of such municipalities and the polling places shall be the same as those designated by such board of election commissioners wherever possible to do so; provided that the county

board of election commissioners is hereby authorized to appoint a special assistant election commissioner for each precinct in any such city or town where a municipal election is to be held to represent said board on the day of each municipal election, who shall have custody of the registration books furnished by the said board for use at said municipal election, and who shall be assigned a position inside the polling place immediately adjoining the judges of election, and such registration books shall be available for the use of the regularly appointed election officials of said city or town during the voting. Where such cities or towns are subdivided into wards, said special assistant commissioners shall be residents of the ward in which the precinct for which they are appointed is located. Such special assistant election commissioners shall each be allowed the sum of six dollars for each election at which they serve, to be paid out of any available revenue of the city or town in which they are required to serve. Such special assistant commissioners shall be required to obtain from the office of the board of election commissioners on the day preceding each municipal election the registration book of the precinct in which he is to serve on the day of said election and to return said registration book to the office of the election commissioners on the day after the election, for which additional service he shall be allowed the sum of one dollar payable out of the revenue of such municipality. All provisions regulating municipal elections in such cities or towns and all penalties provided for the violations of laws relating to municipal elections shall remain in full force and effect as far as they are not amended and modified by the provisions of this article."

The first underscored portion of the above section indicates clearly that in the counties above referred to having cities and towns with a population of not less than ten thousand nor more than one hundred thousand inhabitants, the provisions

of the Article apply as regards registration, but nothing is said about its application to elections.

Again, there is a provision made for the board of election commissioners to appoint a special assistant election commissioner for each precinct in any city or town where a municipal election is to be held, and these assistants represent the board on the day of each municipal election. This, again, clearly indicates that the judges and clerks of elections appointed by various municipalities are governed by the laws relating to municipal elections, and are not judges and clerks appointed by virtue of this Act; otherwise, it would have been unnecessary to appoint special assistants to represent the board of election commissioners.

The following words lend even stronger weight to the above conclusion:

> "Such registration books shall be available for the use of the regularly appointed election officials of said city or town during the voting."

From an examination of the above sections and a reading of the Act, we are of the opinion that the judges and clerks appointed under the Act of 1935 for conducting state and county elections are not ipso facto judges and clerks of elections called by the various municipalities, but such municipal elections are to be conducted by judges and clerks appointed by such municipal authorities and are governed by the laws relating to municipal elections in so far as they are not amended or modified by the provisions of the above Act.

II.

Laws of Missouri, 1929, page 441, provides that townships already established may be subdivided, thus:

> "Each county court may divide the county into convenient townships, and as occasion may require erect new townships, subdivide townships already established, organize better township lines, and may, upon the petition in writing, of not less than twenty-five per centum of the legally qualified voters of each township affected, as such vote was cast in the last preceding general election for the office receiving the greatest number of votes in the township

> or townships affected, consolidate two or more existing townships into one township, or otherwise reduce the number of townships, or change the boundary lines thereof, as may be deemed advisable."

In the case of State of Missouri ex rel. Frank v. Tegethoff, No. 34679, not yet reported, the Supreme Court of Missouri in banc had the question presented whether Central Township could be subdivided by the county court into three townships, thus depriving the duly elected constable of his position. The court upheld the power of the county court to abolish said township and have same subdivided into three new townships. By virtue of the statutory provision of Section 11757, R. S. Mo. 1929, the constable continued to be the constable of the township in which he had his residence, but new constables were appointed for the other townships.

From the above case, we reach the conclusion that Central Township has been abolished.

Section 3, page 230, of the 1935 Session Acts provides that the board of election commissioners may divide a township into election districts, and states in part that:

> "The boards of election commissioners which are hereinafter provided for of such counties in this state shall have power to divide any township in their respective counties into two or more election precincts and to alter such election precincts from time to time as the convenience of the inhabitants may require and the precincts so established shall be numbered consecutively."

Section 5, page 231, of the above Session Acts provides in part that:

> "In such counties four judges and two clerks of election and registration shall be appointed by the board of election commissioners for each election precinct in each of said counties as hereinafter provided * * *."

Section 6, page 231, of the above Session Acts sets out the qualifications of judges and clerks and provides, among other things, that:

> "They must reside in the precinct for which they are selected to act."

The latter section points out that the judges and clerks "must reside in the precinct for which they are selected to act." Central Township being abolished and three new townships created, it goes without question that the judges and clerks under Central Township are no longer qualified to serve for all three townships.

From the foregoing, we are of the opinion that it is necessary that new judges and clerks be appointed for each of the three new townships, to-wit, Normandy, Clayton and Jefferson, unless one or more of the townships has been divided by the board of election commissioners, in which event a set of judges and clerks should be appointed for each precinct.

We do not have a similar provision in our statutes as in the case of constables, providing that the judges and clerks may continue as judges and clerks in the township in which they have their residence. However, we are of the opinion that such judges and clerks may be eligible for re-appointment as a judge or clerk in the township and precinct in which they reside if they have all the other necessary qualifications.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

BUS AND TRUCK LAW: A partnership engaged in transporting for hire, by special agreement, the property of the individual members of the partnership must have a contract hauler's permit.

March 30, 1936 4-1

FILED 2

Mr. C. Arthur Anderson
Prosecuting Attorney
St.Louis County
Clayton, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "I would like to have an opinion from your office with reference to the following:
>
> "The question has come up in our justice courts on several occasions as to whether a partnership formed for the purpose of operating a truck used exclusively for the hauling of goods for the members of the partnership would have to obtain a Public Service Permit. I am enclosing copy of the copartnership agreement entered into between several parties in this State and would like to have your opinion as to whether such a partnership would have to obtain a P. S. C. permit as a common carrier. "

The co-partnership agreement is long and it would serve no useful purpose to set same out in full. It briefly provides that the party of the First part, in consideration of two hundred forty dollars ($240.00) paid by each of the parties of the Second part, sold, transferred and conveyed to each of said parties an undivided one-fifth interest in an International Motor Truck; that the purpose of the partnership is transporting property of the partners, exclusively;

the rates for hauling such freight is to be determined by the parties to the agreement and the profits at the end of one year of operation are to be accounted for and each partner is to receive a dividend of the profits according to the amount invested. The truck used is to make three trips per week to the City of St. Louis, and more if necessary to handle and care for the business of the parties, and at any time that any partner may have a load of six thousand (6,000) pounds a special trip is to be made to take care of this particular load if it can not be cared for on the regular trips. The truck is to be driven by the party of the First part who is to receive a salary of sixty dollars ($60.00) per month and operating expenses out of the income of said business. The parties of the Second part consist of four merchants of Fredericktown, Missouri.

You inquire as to whether such a partnership would have to obtain a P. S. C. Permit as a common carrier.

Section 5268, Laws of Missouri 1931, provides, in part,

> "It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the Commission a certificate declaring that public convenience and necessity will be promoted by such operation."

Bouvier's Law Dictionary, Vol. I, Third Revision, defines 'Common Carriers' as follows:

> "One whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and renumerate him. Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec.133; Fish v. Chapman, 2 Ga. 353, 46 Am. Dec. 393; Schoul. Bailm.sec.345; Naugatuck R. Co. v. Button Co. 24 Conn. 479."

Taking the above agreement at its face value it is plain that the partnership is not operating as a common carrier.

It would, therefore, be unnecessary for the co-partnership to obtain a certificate of public convenience and necessity from the Public Service Commission.

Having determined that the partnership is not operating as a common carrier, the question arises as to whether they are operating as contract haulers.

Section 5271, Laws of Missouri 1931, provides:

> "It is hereby declared unlawful for any contract hauler * * * * to operate or furnish transportation for persons or property or both, for hire, over the highways of this state without first having obtained from the Commission a contract hauler's permit * * * * *."

Sub-section (c) of Section 5264, Laws of Missouri 1931, page 305, reads as follows:

> "(c) The term 'contract hauler' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as therein defined."

There can be no doubt that a person, firm or corporation who transports his or its own property, exclusively, does not come within the provisions of the Act, and is not subject to the jurisdiction of the Public Service Commission.

The above partnership agreement is patently an attempt to avoid the necessity of obtaining a permit from the Public Service Commission and being subject to their jurisdiction. That the partnership is engaged as its principal business in the transportation, for compensation, of property for particular persons to or from particular places under special agreement and that they are not operating as a common carrier is plain from the co-partnership agreement. They therefore come within the definition of "contract hauler" and must obtain a contract hauler's permit unless it can be said that said partnership is engaged in transporting its own property exclusively. According to the agreement no property of the partnership is to be transported but only the individual property of the various members of the co-partnership. The property of the individual members of the partnership is transported by the partnership for compensation to or from a particular place of places under special agreement between the individual members of the co-partnership.

It is, therefore, our opinion that under the terms of the co-partnership agreement submitted to us that the partnership in question is engaged in operating its business as a contract hauler and must obtain a contract hauler's permit from the Public Service Commission before transporting the property, for hire, of the individual members of the partnership, over the highways of this State.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

CIRCUIT CLERKS: There is no statute at present time governing salary of Circuit Clerk of St. Louis County. Sec. 14563, R.S. Mo. 1929 cannot be made to apply.

5-20

May 19, 1936.

FILED
2

Honorable C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of May 6 wherein you inquire on behalf of Mr. Oscar H. Jacobsmeyer, Clerk of the Circuit Court of St. Louis County, as to the effect of the decision in the case of State of Mo. ex rel. Jacobsmeyer v. Thatcher, et al, recently decided by the Supreme Court, on Mr. Jacobsmeyer's salary.

In the last paragraph of the decision in this case, written by Judge Hays, there appear these pertinent sentences:

> "Its parts are so mutually connected and interdependent as to warrant the belief the Legislature intended them as a complete whole, and we so regard them. We cannot legislate. Only the Legislature can correct its manifest oversight in failing to make some provision by law for compensating the clerk of the Circuit Court of St.Louis County."

Are we at liberty to say that the Supreme Court did not mean what it said? Most assuredly not. However, you call our attention to Section 14563, R.S. Mo. 1929, which may be pertinent to the question of Mr. Jacobsmeyer's salary on the theory that the Supreme Court did not mention the existence of such a statute at the time of the rendition of the Jacobsmeyer v. Thatcher decision.

Section 14563 is found under the caption of Hannibal Court of Common Pleas. It was evidently the intention of the Legislature to provide for the salary of clerks of courts of common pleas. The first portion of the statute appears to be a duplication of the original repealed sections 11808, 11786, 11820, et al, relating to the salaries and fees of circuit clerks.

Bearing in mind that Judge Hays in the Jacobsmeyer-Thatcher decision states that all sections relating to clerks of circuit courts are now consolidated into one new section - 11786, Laws of Mo. 1933 - we are of the opinion that Section 11563, R.S. Mo. 1929, in so far as it might have applied to the salaries of circuit clerks, has lost its potency by said repeal, and it is doubtful if it ever in any way affected or was applicable to the salary of circuit clerks other than to the clerk of the courts of common pleas. Irrespective of any prior affect it may have had, we think it has been repealed by the enactments of 1933.

In the case of State ex rel. Missouri Pac. Ry. Co. v. Public Service Commission of Missouri, 204 S.W. 395, it was held that where two statutes dealing with the same subject matter are in conflict so that both cannot be operative, the latter act will be regarded as a substitute for the former, and will operate as a repeal, although without a repealing clause.

To the same effect is the case of Maret v. Hough, 185 S.W. 544, wherein the Court said:

> "When a law-making power enacts a new statute covering the whole subject-matter of prior laws on such subject and manifesting an intention to substitute the subsequent for the prior laws, then such prior laws are repealed."

In the case of State v. Stell, 14 S.W. (2d) 515, the Court enunciates this principle of law in the following language:

> "Later act, covering whole subject of earlier acts, and plainly intended as substitute, operates as repeal by implication of former statutes."

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COUNTY COURTS: Not permitted to contract debts beyond the anticipated revenues for the year.

5/28

May 25, 1936.

FILED
2

Hon. C. Arthur Anderson
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We are in receipt of your inquiry which is as follows:

> "Does the law authorize the county court to purchase property on behalf of the county in a year when the county does not have the funds available that year to pay therefor, and when the issuance of a warrant in payment would be illegal, and then in the following year, by reason of the fact that the obligation was incurred the previous year, pay the same in a prior class to class six as defined by the Budget Act?"

Section 12 of Article X of the Missouri Constitution, in part, provides as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose."

In the case of Holloway to use v. Howell County, 240 Mo. 601, the court, in discussing the authority of a county to go in debt, uses the following language, l. c. 613:

> "The theory of our present system of county government is that counties must run their business affairs on the 'cash system'. * * * Running in debt is easy and pleasant while it lasts; paying is 'another story'. The pleasure of debt-making is denied by law to Missouri counties. They can anticipate their revenue, but only for the current year.

In the case of Watson v. Kerr, 279 S. W. 692, speaking on the same subject, the court said, l. c. 695:

> "But in construing the constitutional provision just quoted we have repeatedly held that an indebtedness is not invalid merely because it appears at the end of the year in which it was created that the aggregate indebtedness incurred by the county during that year exceeded the revenue actually collected. If at the time of its creation the indebtedness is within the income which may reasonably be anticipated, it is valid."

In the case of Hawkins v. Cox, 334 Mo. 640, the court in speaking of this same constitutional provision, said, l. c. 649:

> "The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar)year the income and revenue provided for such year', but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in Book v. Earl, 87 Mo. 246, where the court said: 'The contracting of a debt in the future by a county in any manner or for any purpose in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to

do so by the assent of two-thirds of the voters' is prohibited.

In the case of Trask v. Livingston County, 210 Mo. 582, l. c. 594, speaking about whether the indebtedness was created for the building of a bridge at the time of the letting of the contract, the court said:

> "Hence, the indebtedness for these bridges was created, if at all, by a compliance with the law governing the letting and contracting for bridges already noted. When the county became indebted on these bridge contracts must be determined by the 'income and revenue provided for such year,' which under the Constitution must be looked to for the payment of such indebtedness and it was the 'income and revenue provided' for the year 1889, which the county court was authorized to appropriate for that purpose, and not the revenue for the year 1890, which at the date of the contract for the building of said bridges had never been assessed, levied or collected."

The Supreme Court in construing the above constitutional provision has, we think, clearly held that a county cannot in a given year create a debt against the county revenues in excess of the revenues on hand and the reasonable anticipated revenues for that year, and in the case of Barnard & Company v. Knox County, 105 Mo. 382, in holding a contract which went beyond this limit void, the court said, l. c. 390:

> "It is, of course a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such surface view of the matter. The Constitution seeks to protect the citizen and taxpayer and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves to take notice of the limit prescribed by

> the Constitution. * * * Soliciting agents, contractors and others who deal with county officials must see to it that the limit of county indebtedness is not exceeded, and if they fail to do this they must suffer the consequences. Unless this is so, there is an end to all effort to bring about an economical and honest administration of county affairs."

In 1933 (Laws of Missouri, 1933, page 340) the County Budget Law was passed. The first eight sections thereof apply to counties having a population of over 50,000, and we understand St. Louis County ho have more than 50,000 population.

Section 1 requires the county court, at the February Term, to file a budget of estimated receipts and expenditures for the year January 1 to December 31, and

> "the receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year.* * * "

The county court shall classify proposed expenditures as set out in Section 3, thereof, which provides for six classifieations.

Section 5 requires the county court to show the estimated expenditures for the year for each of the various classes, and in defining class six provides in part:

> "No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any

> warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid."

It appears to be clear that the county court has no authority to purchase goods for the county under the provisions of class six of the Budget Law "if any warrant drawn will go to protest". It is likewise plain that no warrant may be issued in payment of any bill falling in class six unless there is an actual cash balance in the county treasury to pay all prior classes for the current year, and also to pay any warrant previously issued on class six. If the budget money as theretofore set out for payment of classes prior to class six is exhausted before the end of the year and a valid claim in a class prior to class six arises, warrants may be drawn on anticipated funds in class six, and such anticipated funds in class six are thereupon treated as part of such prior funds. The law does not justify the issuance of a warrant nor the agreement to be made by the county to purchase goods in class six if there are any outstanding lawful warrants unpaid for any prior year. No expense is justified nor may it be incurred for the purposes contemplated by class six untill all the other classes have been provided for.

Section 2, class six, Laws of Missouri, 1933, page 342, provides:

> "* * * that if there be outstanding warrants consituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

The question then arises, what are "outstanding warrants constituting legal obligations"?

The first four classes of the Budget Law, Section 2 thereof, appear to be well defined and no question will likely arise as to what expenses fall within any of them. Class five thereof may not consist of more than one-fifth of the anticipated revenue, and the law contemplates that the class five money may be expended for contingent, emergency and incidental county expenses, including expense of paupers not otherwise classified. Nothing from this class may be expended for personal service estimated for in any of the prior four classes.

Section 8 of said Budget Law provides that:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

It will be seen that the plain and necessary meaning of the Budget Law is to conduct the county business on the "pay as you go" basis. The county court must get a clear picture in February of the needs and financial ability of the county for that year. They must get the estimates thereof and are required to go over the same and make thorough examination, and if in their judgment the same should be revised, they are required to revise them. The priorities of classifications set forth by the Legislature "shall be sacredly preserved", said the law-making body.

Section 8 provides that the county treasurer shall remain inactive as to payment of warrants, awaiting the filing of such budget estimate. Prior to its being filed, he is prohibited from paying or protesting warrants for the current year. It will be noted that he is not thereby prohibited from paying warrants that were lawfully issued for accounts due for prior years which are lawfully

payable out of funds for prior years that are on hand. This means that a warrant for the previous year had legally been issued, but the holder had not presented it for payment in the year it was issued, and if the funds were on hand the year it was issued and are on hand when it is presented for payment the subsequent year, the county treasurer is authorized to pay it notwithstanding the budget estimate has not been filed. This is the one exception to complete inactivity on the part of the county treasurer in payment of county warrants prior to filing of the budget estimate.

It appears that the said budget law contemplates that the public funds of the county must reasonably appear to be available during the year to pay for any article purchased by the county during that year. If the county could purchase an article during the year when the funds to pay for it are not available, and it does not appear reasonably certain that such sufficient funds would be available during the year to pay therefor, then the county court would not be keeping either the letter or spirit of the budget law, which commands that "such priority shall be sacredly preserved", and the warrant would not be legally issued and would not be an "outstanding warrant constituting a legal obligation". We find nothing in the budget law which gives precedence in payment to a bill incurred in a previous year on account of that fact.

CONCLUSION.

It is our opinion that the constitutional provision above quoted limiting the authority of contracting county indebtedness makes invalid any contracts of purchase entered into by the county court on behalf of the county when the members of said court do not in good faith believe and have reasonable grounds to believe that the funds are or will be available during the current year to pay such bill as well as all other bills for that year.

Yours very truly

APPROVED:

DRAKE WATSON
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

COUNTY COURT: Has power to contract with private auditing firm to audit the accounts of county officers.

May 27, 1936.

6-3

FILED
2

Honorable C. Arthur Anderson,
Prosecuting Attorney,
St. Louis County,
Clayton, Mo.

Dear Sir:

This department is in receipt of your letter of May 8 wherein you make the following inquiry:

> "I would like to have an opinion as to whether or not the County Court has the legal right to appoint and hire an auditor or auditors to audit the books of county offices. Also, if the county court has a legal right to pay the auditors for same, the contract with said auditors having been made in June, 1935."

We are also in receipt of opinion rendered on April 12, 1935 by the Honorable John E. Mooney, County Counselor, which has been of much assistance in determining the question which you present. It appears that in 1923, Mr. C.C. Wolff, Assistant Prosecuting Attorney, rendered an opinion on this question holding a contrary view from that of Mr. Mooney.

In defining the powers of the county court in relation to auditing and settling claims, Section 12162, R.S. Mo. 1929 contains at the close thereof the following proviso: "Provided, that if a county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers." This proviso, standing alone, would appear to give the county court power to contract with private accountants to audit the various county offices. However, in 1913, the Legislature passed an Act entitled "Examination of books, accounts, settlements and statements of state institutions, county officers, and to provide a uniform system of bookkeeping." By the terms of

this Act the State Auditor was given almost exclusive right to make audits of county officers' accounts. It was necessary to present a petition containing the names of 300 taxpaying citizens and the county was to pay a per diem charge for the examination of the accounts of the county officers. The effect of this Act as it might relate to Section 12162, is discussed in the case of State ex rel. v. Buck, 182 Mo. App.101, a mandamus suit, which is not directly in point. In that case the Court did not determine the effect of this Act on Section 12162, but in a separate concurring opinion of Judge Farrington, it was contended that the proviso mentioned in Sec. 12162 was impliedly repealed by this Act, in the following language: (l.c. 110)

> "It being the first time the Legislature has undertaken to say who could examine the county records, and this act expressly repealing all previous acts or parts of acts not in conformity therewith, it seems to me to expressly repeal that part of section 3781, R.S. 1909, which only incidentally delegated the power to the county courts to name the accountants. What act or part of an act, other than section 3781, R.S. 1909, could the Legislature have had in mind in the repealing section (section 12) of the Act of 1913? It will be borne in mind that the power to have the books audited is not taken away from the county courts but is expressly confirmed in the later law. It is only the incidental power of naming the accountants that to me seems to have been limited. The Act of 1913 for the first time delegated the power to the taxpayers of a county (three hundred or more signing a petition) to have the books audited. The county court is merely the instrument of the people. It is a body formed to carry on the county's business and to protect the rights and interests of the people within their jurisdiction. If those for whom the work of auditing is ultimately to be done and those who are ultimately benefited can only call upon the State examiners for such service, it would not seem far out of reason that the county court acting for

> those people should be limited to the same examiners. The work done by the public examiners would tend to secure uniformity, economy, and good business, as well as amply protect the public, and these were the ideas the lawmaking body must have had in mind in passing the Act of 1913. I therefore construe the Act of 1913 as covering the entire field of who must examine county records regardless of who (whether county court or taxpayers) puts such examination in motion, and that that part of section 3781, R.S. 1909, which incidentally gives the county courts power to employ private accountants has been repealed."

The Act of 1913 remained on our statute books with minor changes until 1933, when the Legislature repealed certain sections and enacted in lieu thereof Section 11478, Laws of Mo. 1933, page 417, which provides:

> "It shall be the duty of the State Auditor at least once every two years, either in person or by one or more competent persons appointed by him, to visit, examine, inspect and audit the accounts of the various institutions of the state, including the state hospitals, state university, Rolla School of Mines, State Teachers Colleges, Missouri State School, Reform School for Boys, Industrial Home for Girls, Missouri State Sanatorium, Confederate Soldiers' Home, Federal Soldiers' Home, and all other institutions supported in whole or in part by the state, and such other officers of the state as receive their appointment from any elective officer, and also, at least once during the term for which any county officer is chosen to examine, inspect and audit the accounts of the various county officers of the state supported in whole or in part by public moneys, and without cost to the county,

> County Clerks, Circuit Clerks, Recorders, County Treasurers, County Collectors, Sheriffs, Public Administrators, Probate Judges, County Surveyors, County Highway Engineers, County Assessors, Prosecuting Attorneys, County Superintendents of Schools, in every county in the state which does not elect and have a County Auditor. Such audit shall be made by the State Auditor as near the expiration of the term of office as the auditing force of the State Auditor will permit. Such audit shall be made in counties having a county auditor whenever qualified voters of the county to a number equal to five per centum of the total number of votes cast in said county for the office of Governor at the last election held for Governor preceding the filing of such petition shall petition the State Auditor for such audit, but such counties shall pay the actual cost thereof into the state treasury. Provided, that any county having an audit by petition shall not be audited more than once in any one year."

The principal change in the new section is the clause "and without cost to the county." Bearing in mind that Judge Farrington's concurring opinion was not the opinion of the court, and the law relating to auditing of county officers' accounts is now entirely different from the Act of 1913, we think the implied repeal, as mentioned by Judge Farrington, does not exist. The state auditors are paid by the State at the present time and it is mandatory on the Auditor to audit the accounts of the various officers as nearly as possible at the close of their respective terms, whereas, the proviso under Section 12162, if valid and effective, gives the county court at any time the power to employ private accountants.

Bearing further in mind that courts do not favor repeals by implication and that no conflict now exists between the statute and the power of the county court and of the State Auditor to audit, we are of the opinion that the county court has the power to employ private accountants at a stipulated fee.

Pursuing the matter from another angle, i.e., the general power of the county court with respect to general financial affairs,

you are referred to the case of State ex rel. Mitchell v. Rose, 313 Mo. l.c. 373, wherein the Court said:

> "The various provisions of the Constitution and statutes, Article VI, Section 36, Constitution of Missouri, and Sections 2574 and 9560, Revised Statutes 1919, demonstrate that it is not only within the power, but is the duty of the county court, to look after public funds, examine, audit, adjust and settle all accounts to which the county shall be a party, and to pay out of the county treasury any sum of money found to be due by the county on such accounts; in short, responsibility for the safety of public funds, the accuracy and honesty of accounts and statements of officials is imposed on the county courts. It is for the county court to audit the claim of the relator to determine the correctness of same and to say whether it will demand that the correctness of the reports made to it by the State Registrar shall be decided by the judicial department of the government before payment is made. (State ex rel. Forgrave v. Hill, 272 Mo. 206, l.c. 213, 198 S.W. 844."

You will note the above decision states "responsibility for the safety of public funds, the accuracy and honesty of accounts and statements of officials is imposed on the county courts." This burden being on the county court, it is our opinion that irrespective of the provisions contained in Section 12162, R.S. Mo. 1929, the county court has implied power to contract with and hire private accountants if it become necessary to conserve the funds of the county and determine whether or not the county officers are rendering honest and legal accounts to the county.

Under Sec. 12199, R.S. Mo. 1929, counties are given the power to create the office of county auditor if the county contains a city of 50,000 and less than 150,000 inhabitants. We assume that St. Louis County has no officer designated as county auditor.

In 1933 the Legislature passed the County Budget Act, Section 19 of which refers to the execution of contracts. The orders, minutes and contract which your county court made with the private

auditing firm appear to meet all the requirements of said section. Section 12, page 348 (Laws of Mo. 1933) is directory in its terms in outlining the contents of the budget document. Section 14 (page 348) gives the county court power to revise and alter the budget. The liability section of the act (Section 20, page 351) by its terms would impose no liability on any of the officers entering into the contract and paying for the services of private auditors.

Section 21 of the County Budget Act (page 351) contains this sentence: "Whenever the term 'accounting officer' shall appear, it shall be deemed to mean the county clerk, auditor, accountant, or other officer or employe keeping the principal financial records of the county." In mentioning "auditor", we do not believe that same refers to a private auditor, but to the county auditor, which in your county does not exist.

Again referring to Section 12199, R.S. Mo. 1929, which gives counties of the population of St. Louis County the right to elect a county auditor, it does not appear that you have elected a county auditor, but we note that on April 12, 1935, Mr. Edward Harper was appointed Auditor of St. Louis County by the county court; then there were orders following purporting to appoint A. Donald Cook as assistant auditor, and later orders to the effect that L.R. Schuessler be appointed assistant auditor. It appears that Mr. Harper has been designated county auditor, whereas, his appointment is merely for the purpose of auditing the county records; he does not have the full authority of a county auditor as enumerated in Sec. 12218, Laws of Mo. 1933, p. 352; therefore, we conclude that there is no conflict between Section 12218, Laws of Mo. 1933, p. 352 and Sec. 11478, Laws of Mo. 1933, p. 417.

CONCLUSION

It is the opinion of this department that the county court has not exceeded its authority in employing a private auditing firm to audit the books of the county officers at a stipulated amount. Such power, if not by direct statutory authority, is among the implied powers of the county court regardless of the fact that under Sec. 11478, the State Auditor is required to audit the accounts of county officers. The contract having been made in 1935, it is our opinion that if St. Louis County has followed the terms of the County Budget Act, Sections 8 to 20 inclusive being the sections pertinent to counties of the size of St. Louis County, the making

of said contract and the paying of same out of county funds would not be in conflict with the County Budget Act.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

INHERITANCE TAX: In computing the inheritance tax a deduction for debts of the deceased may be allowed only to the extent of the amount actually paid the creditor, and not as to the face amount of the debt existing at the date of the death of the deceased.

May 26, 1936

6-3

FILED
3

Hon. Glendy B. Arnold
Judge of Probate Court
City of St.Louis
St.Louis,Missouri

Dear Sir:

In re: Estate of Frank P. Hays,deceased.

This Department is in receipt of your request for an opinion as to whether or not, in computing the inheritance tax due the State of Missouri, a deduction of the face amount of the indebtedness of the testator existing at the death of the testator may be deducted, or the amount which through the voluntary action of the creditor is ultimately required to be paid.

A determination of this question necessarily involves the question of whether the Missouri inheritance tax is a tax upon the right to transmit property, or whether it is upon the right to succeed to property. Fortunately, this matter has been settled recently by the Supreme Court of this State in the case of In re Rosing's Estate 85 S.W. (2d) 495, l. c. 500, wherein Judge Tipton said:

> "Taking the act as a whole, there is no doubt but what our inheritance tax is a tax upon the right of heir or legatee to receive the property."

In the case herein under discussion it is sought to make deductions of substantially $19,000.00, when, in fact, by action of the creditors this $19,000.00 will not have to be paid from the assets of the estate. In other words, the beneficiaries of Mr. Hays will be benefited to the extent of this $19,000.00, and yet it is contended that there should be no tax placed upon these beneficiaries as to this sum. With

this contention we cannot agree, and for the following reasons:

In the case of State ex rel. Smith v. Probate Court 139 Minn. 210, 166 N. W. 125, the Court said:

> "According to the statute the tax is to be computed only upon the clear value of the property, * * * which actually passes to the beneficiaries, and is not to be computed upon the amounts expended in administering the estate or in paying proper charges against it."

And in the case of In re Roebling's Estate 89 N. J. Eq. 163, 104 Atl. 295, the Court, in construing the New Jersey statute which is similar in nature to our statute, said, in part, as follows:

> "The (New Jersey) tax, it will be observed, is not imposed upon the immediate transfer of property occasioned by death, but upon the transfer to any person * * * when the transfer is the subject of a legacy or devise, of distribution or descent. In other words, it is not on the transitory succession of the executor or administrator, but upon the separate successions of the transferee * * * (104 A.,l.c. 297). (Matter in parenthesis added.) "

In the case of Tax Commission ex rel. Price v. Lamprecht 107 Ohio State 535, 140 N. E. 333, the Court had before it the precise question decided in the Rosing case, namely, whether or not the federal estate tax was a proper deduction in computing the Missouri inheritance tax. The Court held the federal estate tax to be a proper deduction, and said:

> "It is difficult to see how the Legislature could have intended that the tax

> should be computed upon property which does not, in fact, pass and which is not, in fact, received by the beneficiary (140 N. E., l. c. 336).
>
> "The value of the right to receive must be exactly equal to the value of the property which passes, and it is shocking to every sense of justice to compute the rate upon a right which is less valuable than the property which passes to the heir pursuant to that right.
>
> * * * * * * * *
>
> "If, therefore, we assume that the Legislature intended to be just and to tax only the actual amount received by each beneficiary, respectively, and assume that the Legislature did not intend to discriminate between one kind of expense of administration and another and to discriminate between one kind of tax and another * * * then the conclusion must be reached that the Legislature also intended that every kind of debt, charge, expense and claim of a valid nature against a decedent's estate should be deducted, and the succession tax computed only upon the balance " (140 N. E., l. c. 337).

While the holding of the Court in that case and in the Rosing case resulted in a benefit to the beneficiaries, by reason of their not being compelled to pay a tax upon property which they did not receive, (a result that will not obtain in the instant case if we are correct in our conclusion) nevertheless, the reasoning of the Court is applicable to the case herein under consideration: The tax is measured by the value of the property ultimately passing to the beneficiaries, though for the purpose of appraising the estate the date of death is controlling.

The Supreme Court of South Carolina, in 1927, (Beidler v. South Carolina Tax Commission 160 S. E. 264) had a proposition similar in nature to the one here under consideration to determine, that is, conceding the federal estate to be a proper deduction in

assessing the state inheritance tax what was the proper measure of the deduction. The Court held that the amount of the federal estate tax actually paid was the proper measure of deduction,and said:

> "The exceptions raising this question are sustained, except that, in making the calculation, the South Carolina tax commission must make the adjustment of the federal tax that must be credited here in South Carolina, upon the basis of what the federal government actually charged and collected; and not necessarily upon the $204 valuation as contended for by the appellants. As the federal tax must come off, it is just and fair that the basis should be what was paid and not upon any other basis. In making the settlement,therefore, if it appears, as stated by appellants, 'the Federal Government collected the estate tax upon a lesser valuation,' then, in making the settlement, the lesser valuation must be used; as the actual amount the federal government received is the test and not figured at so much per stock value on the basis of the tax commission's figures. The reason is this: The entire amount that the tax commission figured, even on the $204 basis under the law can be collected; then that fixes the amount. That total amount is fixed by the lawful authorities. But when it comes to making the deduction of the federal taxes, then what was actually paid must be the measure of the credit and deduction. "

In conclusion, we refer this Court to the Rosing case wherein Judge Tipton said, anent our statutes:

> "To our mind it is clear that the last sentence of this section applies to all four kinds of transfers that are

mentioned in this section. This sentence says: 'Such tax shall be imposed when any person * * * actually comes into the possession and enjoyment of the property * * *.' It follows, therefore, that our state inheritance tax is a tax on the right to receive property and not a tax on the right to transfer property after death.

* *

"As above stated, section 570, supra, provides that: 'Such tax shall be imposed when any person * * * actually comes into the possession and enjoyment of the property.' Certainly this means that only the net amount that each beneficiary actually receives shall be taxed. As the heir or legatee receives no part of the sum of money paid as the federal estate tax, it follows that it should be deducted in the computation of the Missouri inheritance tax. "

CONCLUSION

In view of the foregoing, it is the opinion of this department that, for the purpose of assessing the inheritance tax due the State of Missouri, deductions for the debts of the deceased may be allowed only to the extent that they are actually paid to the creditors, and that if a creditor voluntarily released the estate from the payment of an indebtedness that the beneficiaries are to that extent further enriched and a tax must be assessed on this amount as if there had been no debt existing at the death of the decedent.

In other words, to take the hypothetical case furnished by counsel for the estate of Frank P. Hays, deceased, if A die with assets of $50,000.00 and owing at the same time a $50,000.00 debt, the net value of his estate for inheritance tax purposes is nothing. However, if, after the death of A,,the creditor voluntarily accepts $1,000.00 in payment of the $50,000.00 claim, for the purpose of computing the inheritance tax due the State of Missouri there must be a tax assessed upon the right of the beneficiary of Mr. A. to receive the $49,000.00.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

INHERITANCE TAX: Brokerage houses are subject to the provisions of Section 583, R.S. Mo. 1929.

October 20, 1936. 10-20

FILED
3

Mr. Ed Arnett,
Inheritance Tax Supervisor,
Office of State Treasurer,
Jefferson City, Missouri.

Dear Sir:

In reply to your oral request for an opinion of October 20, it is the opinion of this department that not only banks, but also every other institution or person, including brokerage houses, having in their possession or under their control securities, deposits or other assets belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of such decedent and one or more persons, including the shares of capital stock of corporations, are subject to the provisions of Section 583, R.S. Mo. 1929, and to the penalties provided by that section.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

JWH:AH

CIRCUIT CLERK: Circuit Clerk appointed by Governor "until next general election" relinquishes the office after the general election in November.

November 9,1936.

11-10

FILED
3

Mr. Elmer Aven,
Circuit Clerk and Ex-officio Recorder,
Christian County,
Ozark, Missouri.

Dear Sir:

This department is in receipt of your letter of November 5, wherein you request an opinion based on the following facts:

> "The circuit clerk and ex-officio recorder of this county died in July 1936 and I was appointed by Governor Park to serve until my successor is elected and qualified.
>
> "At the election just past, I was defeated by a republican for this office and I am desirous of knowing if I am supposed to hold the office until first Monday in January or if he can force me to surrender the office at once."

We assume that the person elected on November 3 was elected to fill the unexpired term of Circuit Clerk and Ex-officio Recorder of Christian County, as the regular election for a four-year term for that office was held in 1934; the next regular election to fill a four-year term will be in 1938. We call this feature to your attention for the reason that it will have an important bearing on our ultimate conclusion.

There are two sections of the statute which bear on the question and they must be analyzed to determine which is applicable in the instant case. Section 10216, R.S. Mo. 1929 is what is commonly termed a general vacancy section, and is as follows:

> "Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election, at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

Whenever there is no specific section pertaining to a vacancy in any particular office, in most instances, with the exception as mentioned in the statute, Section 10216 is followed. However, when a vacancy occurs in the office of Circuit Clerk, Section 11665 must be given consideration, said section being as follows:

> "When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office, who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed."

Sections 10216 and 11665 appear to be contradictory as to the length of time of an appointment. Section 11665 contains the clause "who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed", while Section 10216 states: "continue in such office until the first Monday in January next following the first ensuing general election, at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term."

In the case of State ex inf. v. Koeln, 270 Mo. 174, it was held:

> "The person elected at the preceding November election to fill an unexpired term does not take possession of the office immediately upon his election, nor until the next March, whether the Governor filled the vacancy by appointment prior or subsequent to such election."

Prior to 1921 there was a special section similar to Section 11665 which related to a vacancy in the office of Circuit Judge. The section was repealed in 1921, and in construing the effect of the section prior to its being repealed, the Supreme Court, in the case of State ex inf. v. Amick, 247 Mo. 271, said:

> "This section, read together with Section 2374, R.S. Mo. 1919, enacted, at the same time, provided for the filling of vacancies in courts of record. It is held to give the latter provision the effect of a special statute, the term of a circuit judge appointed in 1911 to a vacancy in a term expiring in 1914 expired November 5, 1912 following the election of a judge at a general election."

In construing the effect of Section 10216 when considered with other special sections dealing with vacancies, the court in the case of State v. Schweitzer, 258 S.W. l.c. 439, said:

> "Reading together sections 13823, 782, 9168 and 4786, and giving full effect to each, we think the logical conclusion is that, when a vacancy occurs in the office of prosecuting

attorney for the St. Louis Court of Criminal Correction, the Governor shall appoint some competent person to fill the same until the next regular election for said office and until his successor shall be elected and shall qualify, but that the successor so elected cannot qualify for a term beginning earlier than January 1st following such election. Where such vacancy occurs before a general election, not the regular election to fill the office, the effect of Section 4786 would necessarily have to be considered. But that question is not in this case. The foregoing is the only conclusion which can be reached by giving effect to all of said sections of the statute without running counter to express provisions contained in one or more of them.

"It is our conclusion that no short or unexpired term existed between the November, 1922 election and January 1st following; that relator was appointed for the term expiring December 31, 1922, and thereafter until his duly elected and commissioned successor had qualified."

CONCLUSION

We are of the opinion that Section 11665, R.S. Mo. 1929 is a section special in nature and the general rule of law is to the effect that when two sections dealing with the same matter, one general in nature and the other special in nature, the special section takes precedence over the general section. If your successor was not elected to fill an unexpired term, then he could not qualify until January, 1937; therefore, you would hold the office until that time, using the logic and reasoning as contained in the Sweitzer decision wherein it states "where such vacancy occurs before a general election, not the regular election to fill the office, the effect of Section 4786 (10216) would necessarily have to be considered. But that question is not in this case.

It is therefore, the opinion of this department that your tenure of office under your appointment terminated at the general

election held on November 3, 1936, and your successor is entitled to the office on the date he qualifies. To hold otherwise, it would be necessary to wholly disregard Section 11665 and to make the same a nullity.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:AH

DELINQUENT TAXES: If County Court compromises taxes in accordance with Sec. 9950, Laws 1933, p. 427, County Collector is not personally liable.

12-31

December 30, 1936.

FILED
4

Mr. Sam A. Baker,
Collector of Revenue,
Bollinger County,
Marble Hill, Missouri.

Dear Sir:

This department is in receipt of your letter requesting an opinion based on the following facts:

> "We are having a little difference of opinion over compromising State and County taxes after it has been advertised for sale.
>
> "I offered a tract of land (160 acres) which had about $170.00 taxes and costs against it and did not receive a bid. Now the agent for this Donaldson Estate, having about 3,000 or 4,000 acres in this county, has sold this particular 160 acres for $300.00 and wants the county court to cut the taxes 50%. The Donaldson Estate is not willing to pay taxes on all their land in this county on a basis of 50% but are picking out the best tracts, paying on them and letting the State and County hold their worthless land.
>
> "I have refused to accept payment so far on this land under the impression that the County Court has no authority to compromise taxes unless they are reasonably sure the land is not worth the taxes. Am I liable to the State and County for their tax if, after the court compromises said taxes and I accept payment, the question should arise and proven that the land was really worth the original amount of taxes?"

We assume that the County Court of your county has attempted to compromise the taxes mentioned above under Section 9950, Laws of Mo. 1933, p. 427, which is as follows:

> "Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book' or recorded list of delinquent land and lots in the collector's office or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

The above quoted section imposes no duty on the county collector with reference to a compromise of taxes. We are further assuming that the compromise is without fraud, mistake or misrepresentation. If this be true, then the question as stated in your letter resolves itself into liability on your part as

collector. Again referring you to Section 9950, which contains this sentence: "and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due * * * " we think the same absolves you from any liability.

In the decision of State, to Use of Pacific Railroad Co. v. Dulle, 48 Mo. 282, the Court said:

> "Where a statute made all property liable to taxation, and empowered the several county courts to levy such sums as might be annually necessary to defray the expenses of their successive counties by taxes on all property made taxable by law for state purposes, it conferred jurisdiction, and was a sufficient warrant for a collector to justify him in obeying the process and mandate placed in his hands; and he will be protected, notwithstanding irregularities in the mode of the assessment."

And, in the case of Brown v. Harris, 52 Mo. 306, it was held that a ministerial officer is protected in executing a mandate of a court which has power to issue it.

CONCLUSION

It is the opinion of this department that if the County Court compromises the taxes in question in accordance with Section 9950, supra, in the absence of any fraud, so far as you are personally concerned, there is no liability on you as County Collector.

Respectfully submitted,

APPROVED:

J.E. TAYLOR,
(Acting) Attorney General

OLLIVER W. NOLEN,
Assistant Attorney General.

OWN:AH

MARRIAGE: It is not illegal for Circuit Clerk Ex-officio Recorder of Deeds to direct couples to ministers or other persons authorized under the statutes to perform marriages.

January 16, 1936.

1-17

FILED
5

Honorable Gilbert Barlow
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This Department is in receipt of your letter of January 9, 1936, enclosing a letter which you recently received from the Honorable J. Q. Brown, Justice of the Peace. Your letter is as follows:

> "I enclose a query from Mr. J. Q. Brown a justice of the peace of Bethany Township Harrison County Missouri.
>
> "It seems that the circuit clerk and recorder on issuing a marriage license or some of the deputies are attempting to direct the licenses to some other justice or minister to perform the ceremony.
>
> "I think it is Mr. Brown's contention that the circuit clerk and his deputies merely have the duty of issuing the license and not attempt to direct to whom should go to have the marriage ceremony performed. I wish you would please advise on this matter."

By the terms of Section 2978 R. S. Mo. 1929, it is the duty of the recorder to issue a marriage license, said Section being as follows:

> "The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same, which may be in the following form:* * * *"

By the terms of Section 2976 R. S. Mo. 1929, any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel is authorized to solemnize marriage, said section being as follows:

> "Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

We agree with Mr. Brown in his contention that the circuit clerk or the recorder who issues the marriage license has performed his duties as soon as the license is issued, and there are no further duties devolving upon him to direct the marriage to any particular minister, justice, or another person authorized to solemnize the marriage. Mr. Brown mentions that the former circuit clerk was also an ordained minister, and in many instances performing the ceremony after issuing the license. We cannot discern anything illegal in this act on the part of the circuit clerk, as he was both qualified to issue the license and to solemnize the marriage, and there is apparently no conflict in the two duties.

Mr. Brown also states in his letter that the successor in the office of the circuit clerk is not a minister, but solicits and directs couples to certain persons to perform the wedding ceremony. We cannot declare this practice to be illegal as we know of no authority holding to the contrary, but we frankly say that such a situation is unusual.

Respectfully submitted

OLLIVER NOLEN
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

OWN:H

CIRCUIT CLERKS - Cannot retain fees allowed in excess of the amount as contained in Section 11786, Laws Mo. 1933.

2-6

January 31, 1936

FILED
5

Honorable Lee Barham
Circuit Clerk
Stoddard County
Bloomfield, Missouri

Dear Sir:

This department is in receipt of your letter of January 20, 1936 relating to certain fees of your office. Your letter is as follows:

> "At your earliest convenience I would like to have your opinion and the law, on the accounting of the fees earned by and due the Circuit Clerk, in Drainage District and Levee tax suits, filed since October, 1935.
>
> "Does the Circuit Clerk have to account for fees earned in such suits filed in the Circuit Court?"

In 1933, the Legislature, Laws Mo. 1933, p. 369, repealed and re-enacted Section 11786. The pertinant part of the new section relating to the salary of circuit clerks in counties of your population is herewith quoted:

> " * in counties having a population of 25,000 and less than 30,000 persons, the sum of $2300.00; in counties having a population of 30,000 and less than 70,000 persons, the sum of $2500.00; in counties having a population of 70,000 and less than 80,000 persons, the sum of $3000.00; provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be

considered as one for the purpose of this section; provided further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

The Legislature also repealed and re-enacted Section 11814, R. S. Mo. 1929 relating to the collection of fees and reports of the circuit clerk, said section being as follows:

"It shall be the duty of the clerk of the circuit court to charge and collect for the county, in all cases, every fee accruing to his office and to which he may be entitled under the provisions of sections 11785, 11787 and 11788 or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for same, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the property of the persons liable therefor, or their sureties, as authorized and provided by section 11776. Such clerk shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, stating the title of the case or on what account such fees were charged, together with the names of the persons paying or who are liable for same, with the names of all sureties, where security for costs has been required, and which report shall also show which of such fees have been paid and the total amount thereof, and what fee bills, if any, have been issued and for what fees and when placed in the hands of the sheriff for collection, and further stating that, after due diligence,

> he has been unable to collect the fees reported unpaid, and which said report shall be verified by the affidavit of such clerk. It shall be the duty of the circuit clerk, upon the filing of said report, to forthwith pay over to the county treasurer all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipts therefor, one of which shall be filed with the county clerk, and every circuit clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided. It shall be the duty of the county court to examine said monthly report of the circuit clerk and to require the prosecuting attorney to enforce payment of all fees therein shown to be unpaid, in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority at any time to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

We assume that you have in mind Section 10878, R. S. Mo. 1929, which is as follows:

> "That it is understood that the ordinary fee statute does not apply to services rendered by any county or township officer or witness in the organization, incorporation or administration of any drainage or levee districts heretofore organized, in process of organization at the time of passage of this article, or that hereafter may be organized under any general or special law of Missouri permitting the organization of drainage or levee districts, but that such officer or witness, except as is otherwise provided for in the subsequent sections of this article, shall receive only a reasonable compensation to be fixed by the courts for services actually rendered, that petitioners for formation or incorporation of drainage and levee districts

> and the officers of such districts after the same have been organized may prepare, write or print all copies of petitions, writs, orders and decrees of courts and other papers pertaining to such districts and furnish the same to the county and circuit clerks or other officers for their use, and in such event such officer shall be entitled to only a reasonable compensation for services actually rendered the districts in issuing such writs and copies of decrees, orders or other papers."

The section pertaining to the fees of circuit clerks with reference to drains and levees is Section 10879, R. S. Mo. 1929, which is as follows:

> "The county and circuit clerks, except as limited in section 10878 and otherwise specified in statutes governing the organization and administration of drainage and levee districts, shall receive (in addition to the fees and deputy hire allowed under the provisions of section 11811, R. S. 1929), for filing each paper relating to a drainage or levee district, five cents; for issuing each subpoena, summons or notice, and for approving and filing each bond, twenty-five cents; for recording or copying each one hundred words and numbers, eight cents, any number consisting of more than three figures to be considered as two numbers. The fees of the sheriffs and witnesses shall be the same as allowed in section 10878 of this article."

We further assume that the question arises as to what interpretation is to be placed upon the phrase, "in addition to the fees and deputy hire allowed under the provisions of section 11811, R. S. 1929". In other words, when the Legislature re-enacted Sections 11786 and 11814, - are the fees as provided in Section 10879, to be included in the aggregate amount to be retained by the circuit clerk as a salary, or are said fees to be in addition to the aggregate amount?

Section 10879, R. S. Mo. 1929 has been on our statute booksfor a number of years. Hence, when the Legislature re-enacted Sections 11786 and 11814, we have the question of the later statute taking precedence over the old statute.

In the case of State v. Ebbs, 89 Mo. App. l.c. 98, the court, in construing the statute, said:

> "The general purpose and object of a statute is never to be overlooked in its construction and application, and it should always have a reasonable construction."

In the case of State ex rel. Monier v. Crawford, 303 Mo. 652, l.c. 661, the court said:

> "The general language referred to cannot be construed to destroy specific contrary provisions in the later act, nor will the fact that the two acts are passed at the same session prevent the later from repealing and modifying the former if they are in irreconcilable conflict. When two acts in pari materia are passed at the same session they are to be construed so that both can stand if reasonable construction will permit. Nevertheless, if there is irreconcilable repugnancy, the later act prevails."

We call your attention to the fact that in Section 11786, R. S. Mo. 1929, quoted supra, the following proviso is made:

> " * that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; * "

In the case of Brown v. Patterson, 224 Mo. 639, the court said, l.c. 658:

> "The office of a 'proviso' is to limit or restrict the general language preceding it, and not to enlarge the enacting clause."

Also, in the case of State v. Breckenridge, 219 Mo. App. 587:

> "As a rule, exceptions in statutes are strictly construed."

CONCLUSIONS.

We are of the opinion that the Legislature, by enacting Section 11786, setting forth plainly and concisely the aggregate amount of fees the circuit clerks of the State could retain as their compensation, includes fees from every source and of every nature, and that the only fees or compensation that a clerk can receive in addition to the amount specified in said section are change of venue cases.

Therefore, we construe the clause, "in addition to the fees and deputy hire allowed under the provisions of section 11811, R. S. 1929" to permit the circuit clerk to make the charges as contained in the sections, but he must account for such fees and include the same in the amount that he may retain as compensation.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:FE

CITIES - City of fourth class may, by ordinance, provide for the appointment of a collector of light and water revenue.

March 28, 1936. 4-1



Honorable George B. Barnett
Collector of Light and Water Revenue
Lebanon, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"In explanation: In October, 1934, the elected City Collector, who collected property taxes and light & water revenue, was suspended due to an alleged shortage in accounts which has not been settled to date. According to the understanding, at that time, the office went to the City Treasurer. Due to the fact that the City Treasurer held a good position in a local bank, he declined trying to take care of the collection of light & water revenue, but has collected property taxes. An ordinance was passed at that time making the office of Collector of Light & Water revenue an appointive office by vote of the board of aldermen, or at least that is my understanding of the situation. I received a temporary appointment at that time, pending the outcome of the difficulties of the suspended collector.

"Now a city election is coming in a few days and the question is raised that the person elected Collector will, by virtue of law, take over the collection of light & water revenue along with collection of property taxes. IF THIS IS THE LAW, it

> would be to my advantage to announce for Collector and try to secure the office by the vote of the people. If this isn't true, it would be absurd for me to make any race, due to the fact the salary paid for collector of property taxes, on a commission basis is smaller than the set salary of Collector of Light & Water Revenue. In my opinion, the marjority of board of aldermen would rather the offices stay as they have been under my temporary appointment. But, at least one alderman, and perhaps some other citizens are determined that the elected Collector shall also collect light & water revenue.
>
> "This town is incorporated under laws of a 4th class town, although having a population for a 3rd class town, and the light & water plant is a municipal plant."

We point to the general law respecting what cities of the fourth class may do towards enacting ordinances that are not inconsistent with the provisions of the laws of this State. Your attention is directed to Section 7289, R. S. Mo. 1929 relating to municipalities enacting laws in conformity with the State laws. Said section reads as follows:

> "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

It may be seen from a perusal of the above section of the statute that municipalities must confine their or-

dinances to and in conformity with the state laws upon the same subject.

Section 6951, R. S. Mo. 1929, relating to the elective officers in cities of the fourth class, provides as follows:

> "The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor, marshal, collector and board of aldermen, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successor shall be elected or appointed and qualified."

You will note from the above section that one of the elective officers, under the provisions of this statute, is a collector.

Section 6960, R. S. Mo. 1929, relating to appointive officers, provides in part as follows:

> "The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, * * * "

The above section of the statute does not specifically provide for a collector of light and water revenue.

However, from the above quoted part of the section which is underlined, it is evident that other officers may be appointed by the mayor with the consent of a majority of the board of aldermen, if they are authorized by ordinance, and deemed for the best interests of the city.

A further perusal of the statutes indicates, under Section 6974, R. S. Mo. 1929, that the powers and duties of officers in any way connected with the city government may be prescribed by ordinance. A part of said section reads as follows:

> "The duties, powers and privileges of officers of every character in any way connected with the city government, not herein defined, shall be prescribed by ordinance."

It may readily be seen from the above section that the powers and duties of any officers connected with the city government having not heretofore been defined by our state laws, may be prescribed by ordinance.

Section 7028, R. S. Mo. 1929, relating to the board of aldermen of cities of the fourth class having the right to erect, maintain and operate electric works, provides in part as follows:

> "The board of aldermen shall have the right, also, to erect, maintain and operate gas works, electric light works, or light works of any other kind or name, and to erect lamp posts, electric light poles, or any other apparatus or appliances necessary to light the streets, avenues, alleys or other public places, and to supply private lights for the use of the inhabitants of the city and its suburbs, and to regulate the same, * * "

Section 7029, R. S. Mo. 1929, relating to the right of the Board of Aldermen to erect, maintain and operate water works for a city of the fourth class, provides in part as follows:

> "The board of aldermen shall have the right, also, to erect, maintain and operate water-works for the city, and to regulate the same, * * "

In construing the above two quoted sections of the statute, we must interpret the word "regulate", as set forth in the statutes, for the purpose of determining your request for an opinion.

In the case of State ex rel. vs. Fields, 218 Mo. App. 155, l.c. 167, the court, in defining the word "regulate", said:

> "To 'regulate' means 'to adjust, order, or govern by rule, method, or established mode; direct or manage according to certain standards or laws; subject to rules, restrictions or governing principles.' "

It naturally follows that since a city of the fourth class is given the right to erect, maintain and operate electric light and water works for said city, that such city could, by ordinance, provide for officers to operate said electric light and water works, and in this connection could appoint a collector of the light and water revenue.

The law has not provided any duties for the elective officers and has left it up to the board of aldermen to enact by ordinance the duties and powers and privileges of any of the city officers under the provisions of Section 6974, supra.

CONCLUSION.

In light of the above sections of the statutes, it is our opinion that the board of aldermen in cities of

the fourth class may appoint a collector of light and water revenue which shall be a separate and distinct office from the city collector who collects the personal and property taxes for the city.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:FE

VILLAGES and TOWNS - Villages and towns should style their ordinances in accordance with the statutes relating to such villages and towns.

April 18, 1936.

FILED
5

Mr. William Barton
Jonesburg, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"May a town, with five trustees, under the village and town municipal form of electing trustees and managing the town government, having been operating under that form since incorporation, style their ordinances under Section 7133 Revised Statutes of Missouri 1929 as follows " * * * * Trustees of the Village of _____, or should Trustees of the Town of _____. Section 7133 uses the word 'shall be', which it seems would make it rather mandatory to use the word village, there being a further condition that such town now has a population of over 500 or about 571 population according to the last 1930 census, tho it has not changed to a fourth class city, and operates as it always has by an election of five trustees under the Village and Town form of government?

"If after styling their ordinances as a village, and actually having over 500 population, or 571, and operating as a village, would the enclosed ordinance be in proper form, and under their power as such operating village, or town, enforceable, presuming that of course, said ordinance would be properly passed and approved by the Board of Trustees?

"I make this inquiry because if such a village or town in my County is placed in a situation so as not enforce its ordinances, some corrective legislation should be offered to remedy the situation.

"Incidentally, the ordinance in question is one to be used by the town of New Florence to obtain money to repair their streets and maintain them. I shall therefore turn over to them such information as you se[illegible] me in regard to such situation."

Appended to your request for an opinion is a copy of a proposed ordinance relating to a motor vehicle tax, which we do not deem necessary to set forth for the purposes of this opinion.

There has been no attempt in this opinion to pass upon the validity of the proposed ordinance.

Inferentially, it appears that you believe that by reason of having of population of over five hundred, that the ordinance submitted would not be in proper form. The fact that your city has a population of five hundred seventy-one does not in anywise take it out of the town and village class set forth in our statutes. In the case of State ex rel. vs. Ryan, 232 Mo., l.c. 91, the court, in passing upon a proposition similar to the one which you infer, said:

"A city does not pass from one class to another automatically as counties do under the jury chapter. It passes by virtue of a vote of its people - its people shed their old charter, soul and shell, and assume new ones - the vote of the people in adopting the change being strictly in the nature of an act of incorporation - an entity is born, a municipal corporation, an artificial person, that may not lose its life and charter franchises otherwise than by another act of sovereignty, viz., another vote of the people reincorporating the city in another class."

The style of ordinances relating to towns and villages is provided for in Section 7132, R. S. Mo. 1929. It reads as follows:

> "The style of ordinances of villages organized under the provisions of this article shall be: 'Be it ordained by the board of trustees of the village of _____, as follows.' "

It is evident that the Legislature intended that the style of ordinances of villages organized under the provisions relating to towns and villages should be as above indicated. In construing the word "shall" as used in the statutes, which directs that an act or proceeding be done in a particular way, we direct your attention to the case of Ex parte Brown, 297 S. W. l.c. 447; the court said:

> "When a fair interpretation of a statute which directs acts or proceedings to be done in a certain way shows that the Legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, then such statute is mandatory."

CONCLUSION.

In light of the above, it is the opinion of this department that the form of the proposed ordinance submitted with your request for an opinion is in proper form and complies with the provisions of Section 7132, supra.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:FE

COMMITTEE: Organization of County Committee.

August 14, 1936.

8-15

FILED
5

Mr. S. L. Baysinger, Chairman
Phelps County Democratic Committee
Rolla, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion of this office dated August 14, 1936, and reading as follows:

> "I am writing you this letter to get some definite information on the organization of the County Committees for next Tuesday.
>
> Does the out-going Chairman of the old committee preside until the chairman of the new committee is elected?
>
> Does the old committee adjourn sine die and the new committee elect one of their members through a motion to act as temporary chairman and proceed to the election of the new officers, or can they nominate and elect a new chairman and other officers without any other action.
>
> Has either committee the power to exclude proxys?"

Section 10280 R. S. Missouri 1929, provides as follows:

> "The county committee, or city committee, as the case may be, shall be composed of the committeemen and committeewomen elected in the several townships, or voting districts, at the August primary next preceding, and shall meet at the county seat of the several counties of this state, and at such place in any city not within a county as the chairman of the then city committee may designate, on the third Tuesday in August of the year in which the primary election is held, and organize by the election of one of its members as chairman, and one of its members as vice-chairman, one of whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of the committee."

Section 5 of Article XIV of the Missouri Constitution provides as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

CONCLUSION.

It is our opinion that the Committee must meet and organize as their first act, by electing officers, before proceeding to pass resolutions, motions or doing any other committee business. No resolutions are in order until the business of electing officers, as provided by statute, is completed.

The Constitution contemplates that the officers of the old committee hold over until the chairman of the new committee be elected and qualified. It would be the duty of the chairman of the old committee to act as the temporary chairman of the new committee to entertain the motion as to the election of the new chairman.

The matter of membership by proxy is purely a matter for the majority of the committee to decide after it be duly organized by electing the statutory officers. The will of the majority should be sustained.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting)Attorney General

WOS:MM

APPROPRIATIONS: Construction of the word "repair" as it appears in the Appropriation Act.

9-1

August 31, 1936.

FILED
5

Dr. S. L. Baysinger
Rolla, Missouri

Dear Dr. Baysinger:

We wish to acknowledge your letter of August 31st, wherein you state as follows:

> "There seems to be a difference of opinion amoung those of us who are interested in the School of Mines as to just what we might spend the Hospital appropriation of $5000, made the last session of the legislature, for.
>
> "If you will turn to page 56 of the Laws of Missouri, 1935 you will find under C, Repairs and Replacements, a line which says Repairs on Hospital, $5000. Now what we want to know is:
>
> "First: Whether an outside fire escape may be placed on the building and paid for out of this appropriation. Second: whether a complete new addition could be attached to the Hospital and paid for out of this appropriation. In putting the addition on, it would be necessary to excavate and put in a new, separate foundation for this addition. Third: whether repairs, such as adding a room and putting on roofing and painting, etc."

Laws of Missouri, 1935, p. 56, sets out the appropriation for the School of Mines and Metallurgy in part as follows:

"C. Repairs and Replacements:
Machinery and equipment, furniture, scientific apparatus, repairs to buildings, and supplies. . .$19,700.00

Repairs on hospital. . . . . 5,000.00"

In the case of Walker v. City of Detroit, 106 N. W. 1123, l. c. 1124, 143 Mich. 427, the Court had the occasion to define the word "repair" thus:

"In 24 Am. & Eng. Enc. L. 470, it is said 'To repair, as is ordinarily understood, is to amend; not to make a new thing, but to refit or make good or restore an existing thing. Thus the term does not include construction or reconstruction.' "

From the above definition of the word "repair", we are of the opinion, (1) that an outside fire escape may not be placed on the building and paid for out of the appropriation unless one already exists, (2) that a new complete addition cannot be attached to the hospital and paid out of the appropriation, (3) that repairs may be made to the present building such as adding a single room, and putting on roofing and painting.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

MS:H

ROADS AND BRIDGES: Bond proposition for road purposes cannot be submitted to part of a township - whole of township must vote for issuance of bonds.

September 22, 1936. 9-24

FILED 5

Honorable Gilbert Barlow,
Prosecuting Attorney,
Harrison County,
Bethany, Missouri.

Dear Sir:

This department is in receipt of your letter of September 9, requesting an opinion as to the following:

"In view of Sections 7960-61-62-63 and 64, R.S. Mo. 1929, the west 3/5 of Jefferson Township, Harrison County, Mo. desires to vote bonds for road purposes to carry out a WPA project.

"Big Creek runs north and south across said township, leaving about 2/5 of the township on the east side of said creek, and this 2/5, or approximately that amount, is included in JH Special Road District now covering U.S. 69 from Bethany north to Iowa-Missouri State line. No bonds are unpaid on the Special Road District. These parties on the east side of the creek have their road running north and south through said township and apparently would not be in favor of voting road bonds covering the whole township. Should a bond proposition for road purposes to build the road on the west 3/5 of the township be submitted to a vote on the whole township, or to that part of the township not in the Special Road District?

"I have advised that the proposition should be submitted to the whole township. March 3, 1923 the Supreme Court En Banc held the

township in a special road district was precluded from voting bonds; 249 S.W. 71, State ex rel. Jackson, et al. vs. Hackman, State Auditor. After that decision, the then Sec. 10751 of R.S. 1919 was amended April 4, 1923, Laws, page 356, now Sec. 7964.

"Please advise if I am correct and give your construction of these sections. This section, it seems, should be amended to let the remaining part of the township vote bonds if it so desires on its property."

The chief statute relating to your question is Section 7964, R.S. Mo. 1929, which is as follows:

"The four next preceding sections, to-wit, sections 7960, 7961, 7962 and 7963, R.S. 1929, shall not apply to any township, the whole or any part of which is included in a special road district that has issued bonds, the whole or any part of which are outstanding and unpaid; nor shall said sections apply to any special road district which includes the whole or any part of any township which has issued bonds for road purposes, the whole or any part of which bonds are outstanding and unpaid, nor shall said sections apply to any special road district which includes the whole or any part of the territory of any other special road district which has incurred an indebtedness evidenced by an issue of bonds, the whole or any part of which are outstanding and unpaid."

Section 7960, R.S. Mo. 1929 gives the county courts of the several counties, on behalf of any township therein, the right to issue bonds, and is as follows:

"The board of commissioners of any special road district organized and incorporated under the laws of this state, for and on behalf of such district, and the county courts of the

> several counties, on behalf of any township in their respective counties, are hereby authorized to issue road bonds to an amount, including existing indebtedness, not exceeding five per centum of the assessed valuation of such special road district or township, as the case may be, to be ascertained by the assessment next before the last assessment for state and county purposes. Such bonds shall be issued in denominations of one hundred dollars or some multiple thereof, to bear interest at not exceeding six per centum per annum, payable semi-annually, and to become due and payable at such times as the board of commissioners or county courts shall determine by order of record, not exceeding twenty (20) years from date of issue."

The decision in the case of State ex rel. Jackson v. Hackmann, 249 S.W. 71 holds in substance as follows:

> "Under Rev. St. 1919, Sec. 10751, providing 'the four preceding sections shall not apply to any township where the whole or any part thereof is included in a special road district, nor to any special road district including the whole or a part of a township which has heretofore issued bonds for road purposes which remain unpaid', held, that any township which was included in whole or part within a special road district was precluded from issuing any bonds for road purposes pursuant to sections 10747-10751, whether or not the district of which it was a part had heretofore issued bonds that remained unpaid."

Before Section 7964, supra, was amended, only the first paragraph or to the first semi-colon was then in existence under Section 10751, R.S. Mo. 1919.

Your question in effect is as to whether or not a portion or 3/5 of the township can vote bonds for the purpose of carrying out

a W P A project, assuming no bonds are unpaid or outstanding on the special road district which is a part of the township. There is no provision in any statute relating to the voting of bonds which permits any part of the township to vote for the issuance of the bonds. Section 7960, supra, states that the county courts of the several counties on behalf of any township in their respective counties are authorized to issue bonds, etc. The exceptions are contained in Section 7964, supra, none of which are to the effect that only a part of a township may have the right to issue bonds.

In view of the foregoing, we are of the opinion that your advice to the county court is correct in that it would be necessary for the whole of the township to vote for the issuance of the bonds.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

INCOME TAX: Under provisions of Sec. 10136, Laws of Mo. 1935, p. 410, it is duty of county collectors and Collector of City of St. Louis to forward all income taxes delinquent for 30 days or more to State Auditor for collection. This applies to 1935 and prior years.

12-8

December 3, 1936.

FILED
5

Honorable W.F. Baumann,
Collector of Revenue,
City of St. Louis,
St. Louis, Missouri.

Dear Sir:

Your inquiry is as follows:

> "Should the City Collector of St. Louis retain under his control and direction and file suit, if he sees fit, on the delinquent state income taxes that became delinquent prior to the enactment of the 1935 Act."

Replying thereto, Section 10124, R.S. Mo. 1929 provides for the division of the State into 115 assessment districts, the boundaries of which shall coincide with the 114 counties and the City of St. Louis, and further provides that "assessors and collectors of the several counties and the City of St. Louis shall be the assessors and collectors of the income tax of the districts in which they live."

Section 10133 of said revision provides as follows:

> "Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by assessors

> and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state."

Section 10136 of the same revision is as follows:

> "All taxes assessed on account of incomes shall become delinquent on the second day of June, where assessments are required to be made and certified to by the assessor prior to April 30, and subsequent to March 15, in all other cases taxes assessed on account of income, shall become delinquent thirty days after the tax book is required by law to be delivered to the collector; and all taxpayers who become delinquent, shall have the same penalties assessed against them as in the case of personal property taxes and suit shall be brought and the taxes collected in the same manner as delinquent personal taxes."

It will be noted that this latter section contains the provision that the then delinquent income taxes are authorized to be collected by suit, stating "and suit shall be brought and the taxes collected in the same manner as delinquent personal taxes." In the wisdom of the Legislature in shaping the public policy of this State, Section 10136, supra, was, by the Laws of 1935, page 410, repealed, and of course, the repeal of that section did away with the authority theretofore by that section conferred, i.e., to collect such delinquent state income taxes "in the same manner as delinquent personal taxes."

In lieu of that former section 10136 (R.S. Mo. 1929), the Legislature thereupon enacted Section 10136 (Laws 1935, p.410) which contains a portion of the same provisions as were contained in the original section which was repealed; but this later section, enacted in 1935, provided a different method of collecting the delinquent income tax, as follows:

That after delinquency, the collector shall, within thirty (30) days, certify the names of the delinquent taxpayers to the State Auditor, and the State Auditor shall, within sixty (60) days thereafter, certify the names of the delinquent taxpayers to the Attorney General, and suit shall be instituted in any court of competent jurisdiction by the Attorney General or by the prosecuting attorney of the county at the direction of the Attorney General, in the name of the State, to recover such tax and enforce the lien therefor.

It will be observed that Section 10136, Laws of Mo. 1935, provides: "All taxes assessed on account of incomes shall become delinquent * * * " It does not say all taxes that may be hereafter assessed on account of income shall become delinquent on a certain date, but it is all inclusive and it thereafter provides in a different way the method of collection of those taxes than that theretofore prescribed. In other words, it seems the fair meaning of the legislative intent was that the collection of all delinquent state income taxes should be not left in the hands of the county collectors for more than thirty days after they became delinquent, but that thereupon they should be certified on to the State Auditor and to the Attorney General, as prescribed in said Act, to the end that the State should have the highest administrative legal officer exert his direct effort or supervisory control over the collection of these taxes.

The fair meaning and we think reasonable implication is that the 1935 Act repealed the provisions of Section 10124, R.S. Mo. 1929 to the extent that the collector of the county or city should be the collector of those delinquent state income taxes not longer than thirty (30) days after the same became delinquent.

CONCLUSION

It is our opinion that if state income taxes have become delinquent and have remained delinquent and unpaid for thirty (30) days, it is the duty of the county collector, or collector of the City of St. Louis, to thereupon and within thirty (30) days of such delinquency, certify all delinquent taxes to the State Auditor under the provisions of the 1935 Law, and that this course should be followed with respect to, not only the taxes that became delinquent in 1935, but also as to all state income taxes that became delinquent prior thereto.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J.E. TAYLOR.

SCHOOL & SCHOOL DISTRICTS:)
) Must state monthly wage and be
CONTRACT: TEACHERS:) definite and certain.

March 18, 1936. 3-30

FILED
6

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Mr. Beckham:

This is to acknowledge receipt of your letter of March 14, 1936, requesting the opinion of this Department, which letter is as follows:

> "I would like to have your opinion upon the following proposition:
>
> "During the past school year there have been a number of school teachers employed in Crawford County under a written contract that provides that the teacher is to receive a stated sum per month as wages, and in addition to that stated sum she is to also receive whatever amount there might remain in the teachers fund at the close of the term of school. It so happened, due to dividend payments from closed banks, and enhanced revenue from the sales tax, that in some case there is more money remaining in the teachers fund at the close of the term of school than the teacher has already received in the form of monthly payments. Now, some of the school boards are questioning whether or not they are bound under the contract to pay the teacher this comparatively large sum of money as a bonus.

> "I believe that the statute section 9209 specifically states that the teachers contract must specify the wage per month to be paid. I am just wondering if this statute is strictly construed, whether or not the school board could legally pay the teacher the remaining balance in the teachers fund as a bonus."

In replying to your question we must refer to the statutes of Missouri governing contracts between school teachers and boards of directors and boards of education, and the general powers given to such boards under the statutes.

Section 9209, R. S. Mo. 1929, as re-enacted by Laws of Missouri, 1933, page 387, provides:

> "The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meetings shall be called by the president and each member notified of the time, place and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. The board shall not employ one of its members as a teacher,

> nor shall the teacher serve as clerk of the district. All transactions of the board under this section must be recorded by and filed with the district clerk. Provided, that the board of Education of any first class high school may employ a superintendent either before or after the annual school election."

Section 9210, R. S. Mo. 1929, provides in part as follows:

> "The contract required in the preceding section shall be construed under the general law of contracts, each party thereto being equally bound thereby. * *"

Section 2962, R. S. Mo. 1929, provides:

> "No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

It will be noted that Section 9209, as amended, provides, "The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid;" etc. It will therefore be seen that the board must specify in the contract the wages per month to be paid the teacher and the contract

cannot be indefinite and uncertain as to the amount of wages per month a teacher may receive, but it must be set out in the contract definitely what the teacher is to receive as wages per month.

Section 2962, supra, provides in part as follows:

> "No * * * school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, * * *"

As was said by the court in Edwards v. Kirkwood, 147 Mo. App. 599, l. c. 617:

> "As the powers and duties of such officers are defined and marked out by the law, they are open to ascertainment for one and all alike. In this respect, there is a distinction between a public and a private agency. In those cases, therefore, where the obligation of the public negotiated through its agent, is sought to be enforced against the municipality, the rule obtains that every person is required at his peril to ascertain at the time the contract is entered into that it is within the scope of the authority which the law conferred upon the officer."

And also in the case of Rudy v. School District, 30 Mo. App. 113, l. c. 117, it is said:

> "There is no question that a school district is a quasi corporation, and that the powers of its corporators and directors are prescribed and limited by statute (Buchanan v. School District, 25 Mo. App. 85), and, also,

> it may be added, by such provisions of the constitution of the state as are self-enforcing. Nor is there any doubt that a person entering into a contract with a school district, through its directors, must, at his peril, take notice of the limited powers of the directors, and if he enters into a contract with them in excess of their powers, no recovery can be had by him thereon. Cheeney v. Brookfield, 60 Mo. 53."

The contract as mentioned in your letter sets forth a stated sum as wages the teacher is to receive and then goes further and says the teacher also is to receive whatever amount might remain in the teacher's fund at the close of the term of school. We do not think that it is within the power of the school board to make a contract which is as indefinite and uncertain as this one would be and give to the teacher this added sum over and above the monthly wage which the statute says must be set forth in the contract. Anyone contracting with a school district does so at his peril and is presumed to know the limitations of the board, and if the board enters into a contract beyond the scope of its powers, no recovery can be had against the school district.

Conclusion.

It is, therefore, the opinion of this Department that that part of the contract which provides that the teacher is to receive "in addition to that stated sum she is to also receive whatever amount there might remain in the teachers fund at the close of the term of school," is invalid and cannot be enforced against the district.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

INTOXICATING LIQUOR: City Ordinance permitting licensees of intoxicating liquor to sell 3.2% beer on Sunday is in conflict with State law, and void.

April 9, 1936

4-11

FILED 6

Honorable E. J. Becker
Supervisor of Liquor Control
Liquor Control Department
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

"The Supervisor requests an immediate opinion upon the following subject:

"The Board of Aldermen of the City of St. Louis has recently passed an ordinance over the Mayor's vetoe, permitting 3.2% beer to be sold between the hours of 12:01 A. M., Sunday to 1:30 A. M., Monday, and between the hours of 1:00 P. M. Sunday to 1:30 A. M., Monday.

"May permittees holding permits to sell all kinds of intoxicating liquors by the drink sell 3.2% beer on Sundays under their by the drink permit?

"Also may persons holding 5% beer permits sell 3.2% beer on Sundays under said 5% beer permits?

"In your opinion is this ordinance, as passed by the Board of Aldermen, valid, and does said ordinance prevent this department from enforcing the provisions of the liquor control act, covering the time and hours of sale of intoxicating liquors, as provided in sections 15 and 15-A of the act, and also the privileges as provided in section 22 of the act? "

The ordinance about which you inquire, recently passed by the Board of Aldermen of the City of St.Louis, is Section 9 of Ordinance Number 40630 which repealed Section 9 formerly enacted. Said section is long and would serve no useful purpose to set it out in full. Briefly, it provides for a license for the sale of 3.2% beer and intoxicating liquor at retail by the drink for consumption in the place where sold, which includes the sale of intoxicating liquor in the original package and such non-intoxicating beer in the original package. Said ordinance also provides for a license to sell malt liquor not in excess of five per cent by weight, at retail, by the drink, which license also permits the holder thereof to sell non-intoxicating beer. It also provides for a license to sell intoxicating liquor in the original package containing not in excess of five per cent of alcohol by weight, which also permits the holder to sell non-intoxicating beer in the original package direct to the consumers. Said ordinance provides further that no person licensed to sell intoxicating liquor shall sell, give away or otherwise dispose of or suffer the same to be done in, upon or about his premises, any intoxicating liquor on the first day of the week commonly called Sunday, or upon the day of any general, municipal, special or primary election in the City of St.Louis; provided, that the sale of such intoxicating liquor may be resumed on any such election day after the expiration of thirty (30) minutes following the hour or time fixed by law for the closing of the polls of any such election. The part of the section about which you are especially concerned provides that all licensees authorized under the provisions of Section 9 to sell non-intocicating beer of not more than 3.2% alcohol by weight, are permitted to sell such non-intoxicating beer between the hours of 12:01 A. M. Sunday to 1:30 A. M. Sunday, and between the hours of 1:00 P. M. Sunday to 1:30 A. M. Monday. As licensees to sell all kind of intoxicating liquor at retail for consumption on the premises, and licensees to sell five per cent beer by the drink, and also licensees to sell intoxicating liquor in the original package containing not in excess of five per cent of alcohol by weight, are permitted to sell 3.2% beer,this ordinance, if valid, would permit such licensees to sell non-intoxicating beer between the hours of 12:01 A. M. Sunday to 1:30 A. M. Sunday and between the hours of 1:00 P. M. Sunday to 1:30 A. M. Monday.

Section 22 of the Liquor Control Act provides that a license issued for the sale of malt liquor not in excess of five per cent by weight, by the drink, for consumption on the premises where sold, shall also permit the holder thereof to sell non-intoxicating beer. A licensee authorized to sell malt liquor containing not in excess of five per cent of alcohol by weight, in the original package, is also authorized to sell non-intoxicating

beer in the original package. This section, however, contains the proviso which reads as follows:

> "Provided, however, that no licensee holding a license to sell malt liquor containing alcohol in excess of three and two-tenths per cent (3.2%) by weight or any other kind or character of intoxicating liquor, shall sell, give away or otherwise dispose of, or suffer the same to be done in, upon or about his premises any non-intoxicating beer in any quantity, either in the original package or by the drink, on the first day of the week commonly called Sunday, or upon the day of any general, special or primary election in this state, or upon any county, township, city, town or municipal election day. Provided, the sale of such intoxicating liquors may be resumed on any such election day after the expiration of thirty minutes next following the hour or time fixed by law for the closing of the polls at any such election. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor."

It is plain from the above that the city ordinance in question is inconsistent and in conflict with section 22 of the State Liquor Control Act. The only authority of a city to regulate and control the sale of intoxicating liquor within its limits is found in Section 25 of the Liquor Control Act, which reads, in part, as follows:

> "The Board of Aldermen, City Council or other proper authorities of incorporated cities, may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, located within their limits, fix the amount to be charged for such license, subject to the limitations of this act, and provide for the collection thereof,

> make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits, provide for penalties for the violation of such ordinances, where not inconsistent with the provisions of this act."

The above section specifically prohibits a city from passing an ordinance inconsistent with the provisions of the Liquor Control Act.

Section 7289, Revised Statutes Missouri 1929, reads as follows:

> "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

It is a well recognized principle of law that when the Legislature provides a uniform system for the regulation, control and licensing of the liquor traffic that it has the effect to repeal all inconsistent provisions of municipal charters and the ordinances adopted under them. In other words, the only authority that a city now has to regulate and control the sale of intoxicating liquor is found in Section 25 of the Liquor Control Act.

In the case of State ex rel. v. McCammon 111 Mo. App. l. c. 630, 631, the Court said:

> "We are of the opinion that the charter powers relied upon do not confer authority upon the city to overturn the general law on the subject of dramshops. Indeed, the charter itself, as above quoted, shows

> that the city has no power to pass ordinances on any subject which are repugnant to the laws of the State. So therefore when the State law says that a license shall be granted on the petition of two-thirds of the inhabitants of a block, the board of aldermen have not the authority to say that there shall be a petition of two-thirds of the entire city. Though the city is authorized to regulate a dramshop, it cannot regulate it in those particulars which would be inconsistent with the regulations made by the State. For instance,it is a part of the State regulation that dramshop keepers shall not sell to minors, nor to habitual drunkards. Nor shall they keep open on Sunday, or keep music halls or gambling devices; nor shall they allow sparring contests or cockfighting. Certainly, a city of the fourth class, under the charter power to regulate dramshops above mentioned, could not, by ordinance, permit such things."

In the case of St.Louis v. Tielkemeyer 226 Mo. l. c. 140, it was said:

> "It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.
>
> "The city of St.Louis has express authority under its charter 'to license, tax and regulate . . . saloons, beer houses, tippling houses, dramshops and gift enterprises.' (Art.3,sec.26,clause 5.)
>
> "The State,however, has the sovereign power to regulate those matters and its authority being paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject."

CONCLUSION

In view of all the above, it is the opinion of this Department that a person licensed to sell intoxicating liquor of any kind, whether five per cent beer or intoxicating liquor of all kinds, is prohibited from selling 3.2% beer on Sundays under the provisions of Section 22 of the Liquor Control Act. If such a licensee should sell 3.2% beer on Sunday he would be guilty of a misdemeanor and subject to prosecution and his license would be subject to be revoked, under the provisions of Section 13 of the Liquor Control Act.

It is the further opinion of this Department that that part of the ordinance in question giving persons licensed to sell intoxicating liquor the right to sell non-intoxicating beer between the hours of 12:01 A. M. Sunday to 1:30 A. M. Sunday, and between the hours of 1:00 P. M. Sunday to 1:30 A. M. Monday, is inconsistent and in conflict with the State law on the same subject, and, is therefore void. In any event the State law being paramount, such ordinance would not prevent your Department from enforcing the provisions of the Liquor Control Act.

Very truly yours,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

COUNTY TREASURER: By reason of Sec. 12132a, Laws 1933, p. 338, office of county treasurer in counties of less than 40,000 inhabitants is abolished and from Jan. 1, 1937 duties of office will be carried on by County Collector.

May 29, 1936.

63

FILED
6

Hon. G.C. Beckham,
Prosecuting Attorney,
Crawford County,
Steelville, Missouri.

Dear Sir:

This department is in receipt of your letter of May 26, requesting an opinion as to the following state of facts:

> "Crawford County has a population of between 11 and 12 thousand, and is not under township organization. Mr. Schroeder's term of office as County Treasurer expires on the 31st day of December, 1936. He now wants to file for this same office again. I have advised him that, in my opinion, section 12132a of the session acts of 1933 eliminates his office, and that the duties of the treasurer will after January 1, 1937, be performed by the Collector.
>
> "Mr. Schroeder does not seem to be satisfied with my construction of this statute, so I would like to have your opinion on the proposition."

Section 12132a, Laws of Missouri, 1933, p. 338 provides:

> "On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector

shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

CONCLUSION

In view of the fact that Crawford County has a population of less than 40,000 inhabitants, it is the opinion of this department that the office of County Treasurer has been abolished by reason of Section 12132a, supra, and the duties of that office will, from the 1st day of January, 1937, be carried out by the County Collector.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

ELECTIONS: (1) Board of election commissioners cannot continue to receive applications for erasure of names after Monday noon, October 19, 1936 under Section 10596, RSMo 1929;
(2) Board of Election Commissioners or any two members do not have power to order recanvass of Kansas City or Portion thereof under Section 10568, RSMo 1929.

October 23, 1936.

FILED
6

Honorable Fred Bellemere, Chairman,
Board of Election Commissioners,
Kansas City, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 21 relating to the registration and election laws governing the City of Kansas City. Your letter is as follows:

> "From time to time up to and including Monday, October 19th, 1936, at noon, there had been reports of fraudulent registration called to the attention of the Board of Election Commissioners by the public press of Kansas City and by the Republican organization. Each of these reports have been carefully investigated by the Board of Election Commissioners and in cases where the registrants were not found at the addresses where registered, an application to have the name erased was filed by the Board in accordance with the provisions of our statutes.
>
> "The question now arises as to what procedure the Board should take on reports of alleged fraudulent registration made from now to election day, and what right, if any, the Board has to erase names from the registers after October 19th, 1936.
>
> "There has been a request made the Board for a recanvass of parts of Kansas City and it is claimed by some that under Section 10568 any two members of the Board have power to order and conduct such recanvass. We desire an opinion on this section."

Under Section 5 of Article VIII of the Constitution of Missouri it is the duty of the Legislature to provide laws governing the registration of voters in counties and cities of certain population. The purpose of such registration is not to deny the right of suffrage to any one, but it is a regulation of that right--not a qualification. Of course, the primary purpose of registration laws is to prevent fraud. Registration permits the ascertaining by the Board of Election Commissioners of an authentic list of the qualified electors. Every statute pertaining to registration and voting should be construed so as to give the voter the fullest opportunity to have his name placed upon the register, consistent and reasonable with precautions against fraudulent registration and voting.

Section 10567, R.S. Mo. 1929 creates a board of election commissioners and along with other statutes, defines the duties and powers of the commission. We deem a board of election commissioners to be an administrative body with judicial functions but with no greater power than those enumerated in the statutes. Pike v. Megoun, 44 Mo. 491; 20 C.J. 85, Sec. 59.

As a general rule, election laws must be liberally construed in aid of the right of suffrage. State ex rel. v. Hough, 193 Mo. 615.

It is further stated in the case of Nance v. Kearbey, 251 Mo. 374 that:

> "The right to vote is not a vested natural right in a strict sense, yet it is a constitutional right in those citizens possessed of enumerated constitutional qualifications."

And again, in the same case, the Court said:

> "A constitutional right to vote may not be so regulated by statute as to be entirely abrogated or lightly denied."

With these principles and decisions in mind, we think that the statutes relating to registration and voting, insofar as the rights of suffrage are concerned, should be liberally construed and in most instances said statutes are directory in nature and not mandatory, as was said in the two cases styled "State v. Brown", 33 S.W. (2nd) 105 and 109.

The first question which you present is in substance - What is the effect of the time of filing applications for erasing names on the register as provided for in Section 10596, R.S. Mo. 1929? Does this statute contain provisions for the elector asserting his own right to register? Is it a statute in which the elector is demanding that he be given the right to register and thus become a legal voter? Our interpretation of this section is that it is not a right given to the elector himself to assert his legal rights to vote, but rather it is a right given to other persons who challenge the right of the elector to register and thereby become a legal voter. The pertinent part of said section is as follows:

> "Applications to said commissioners for the purpose of erasing a name on the register must be made by filing the same in the office of the board at any time before twelve o'clock noon on the Monday of the second week before election, and a docket shall be made in the order of the wards and precincts. The commissioners shall sit to hear such applications, commencing on the Thursday of the second week before such election and continuing with the exception of Sunday until all of such applications are heard and decided. Such sitting shall commence at eight o'clock a.m., and continue to ten o'clock P.M. on each and every of such days with intermissions between twelve o'clock noon, and one o'clock P.M. and five o'clock and six o'clock P.M., on each and every of such days. The application shall be heard in the numerical order of the wards and precincts. Upon the failure of the person to appear in person before the board to answer the application to erase his name from the register at the time it is reached for hearing, the application shall be allowed, unless a majority of the board shall decide otherwise; but in the event of the appearance in person it shall require the action of a majority of the board to allow the application. The decision on each application shall be announced at once, after hearing, and a minute made thereon in the docket. Where the application to erase a name shall

be allowed the board shall cause the same to be erased forthwith. * * * "

Section 10595, R.S. Mo. 1929 should be noted in connection with Section 10596, said section 10595 being as follows:

"Any voter or voters in the ward containing such precinct may make application, in writing, before such board of election commissioners, to have any name upon such register of any precinct in the ward erased; which application shall be in substance in the words and figures following:

I (or we).....do hereby solemnly swear (or affirm) that I (or we) believe that..... is not a qualified voter in the .....precinct.....ward of the city of.....and hence I (or we) ask that his name be erased from the register of such precinct.

But it shall be a misdemeanor to sign or cause to be so filed any such application to have erased any name lawfully upon any such register, unless the person signing such application had then cause to fairly justify him in a belief that the name ought to be erased from such register. Such application shall be signed and sworn to by the applicants, and filed with said board. Thereupon, notice of such application, with the demand to appear and show cause why his name shall not be erased from said register, shall be personally served upon such person, or left at his place of residence, named in such registry, by a messenger of said board of commissioners; as to the manner and time of serving

> such notice, such messenger shall make affidavit; said messenger shall also make affidavit of the facts in case he cannot find such person or his place of residence, and that he went to the place named on such register as his place of residence, which affidavit shall be sufficient evidence of due notice. Such notice shall be served at least one day before the time fixed for such party to show cause. Said commissioners shall also cause a like notice or demand to be sent by mail, duly stamped, and directed to such person to the address upon such registry, at least two days before the day fixed in said notice to show cause."

Reiterating in part the substance of Sections 10595 and 10596, it would appear that after a person has been registered according to the provisions of Chapter 61 of Article 17, Revised Statutes of Missouri 1929, any qualified voter can apply, in writing, to the board if he have cause to fairly justify him in the belief that such voter's name ought to be erased. The person whose name is challenged, or whose name is requested to be erased, receives personal notice of the same and the board fixes a certain day for hearing after the service of the notice. As an added precaution, the board mails a notice to such person.

The first portion of Section 10596 states, "Must be made by filing the same in the office of the board at any time before 12 o'clock noon on the Monday of the second week before election." Therefore, the question resolves itself into whether or not the board is to disregard the time mentioned in said section and continue to receive applications up to and including the day of election, or is it the mandatory duty of the board to follow the terms of the statute and refuse to receive and hear applications filed after Monday noon, October 19, 1936?

The case of State ex. inf. Attorney General v. Lamar, 316 Mo. 721, the Court said:

> "A statute specifying the time within which a public officer is to perform an official act is directory unless the nature of

> the act or the language of the statute shows a limitation of the officer's power."

Regarding the terms of mandatory and directory statutes, we think the rule is well stated in the case of Granite Bituminous Paving Co. v. McManus, 144 Mo. App. 593:

> "Whether a statutory requirement is mandatory or directory depends on its effect. If no substantial rights depend on it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than prescribed and substantially the same results obtained, then the statute will generally be regarded as directory, but if not, it will be mandatory."

Regarding the word "must", if the statute contains the word, the case of Kansas City v. J.I. Case Threshing Mahhine Co., 87 S.W. (2nd) 195 states as follows:

> "The words 'may', 'must', and 'shall' are used interchangeably in statutes without regard to their literal meaning and are to be given effect which is necessary to carry out intention of Legislature as determined by ordinary rules of construction."

In the case of Warrington v. Bobb, 56 S.W. (2nd) 835, the Court said:

> "In determining whether statute is directory or mandatory, the prime object is to ascertain legislative intention, disclosed by statutory terms and provisions in relation to object of legislation."

And again,

> "Statutory provisions relating to essence of thing to be done, that is,

> matters of substance, are 'mandatory' while provisions, compliance with which is not matter of substance, are generally 'directory'."

In the case of Mead v. Jasper County, 18 S.W. (2d) 464, the Court said:

> "A statute fixing the time within which official acts regarding the rights and duties of others is merely directory, unless the nature of the act or phraseology of the statute otherwise require."

We are impressed with and inclined to apply the logic reasoning and law as contained in the case of State ex rel. v. Mason, 144 Mo. l.c. 508-509, to the instant question. In that case the Court said:

> "In Illinois, where the act required registration to be complete by the third Tuesday before the election, it was held constitutional; the court remarking: 'If it be admitted, that the Legislature can require a voter to establish his qualifications before election, it is difficult to see why, upon principle, or as a question of power, it can not require such proof to be made, as well three weeks before the day of voting as ten days, or five days, or even one day prior thereto. The real question, involved in the objection, is, whether any man can be prevented from voting who proves, or offers to prove, on the day on which he seeks to cast his ballot, that he is a legal voter. If cases can be supposed, where the 'three weeks' requirement will deprive qualified electors of the privilege of depositing their votes,

> cases can also be supposed, where one day's requirement will work the same result. This mode of reasoning carried out to its logical sequence, will make any kind of a registry law unconstitutional. For it would be a physical impossibility for the judges of election to receive the votes and make up the registry at the same time and on the same day.' People ex rel. v. Hoffman, 116 Ill. l.c. 614."

Furthermore, we think that Sections 10595 and 10596 confer privileges and rights on persons to challenge or have the name of a prospective voter erased, and for that reason Section 10596, as to the time fixed for the filing of the applications as mentioned in Section 10595, is mandatory and the same constitutes a limitation on the power of the board to receive and act on said applications after the time mentioned in said section.

Conclusion

Any person who has the legal qualifications should not be denied the privilege of registering and voting. The law should clothe him with every right and protection and permit him to have an unhampered privilege of registering his sentiments for or against any question or candidate. It is our opinion that statutes which deal with the individual rights of the electors should be liberally construed and technicalities of a trivial nature should be disregarded and the statute treated as directory. But when the right of a person to register or vote is challenged and some person is seeking and attempting to take away or deprive another of one of his most sacred privileges, we think such statutes should be construed as being mandatory and that one who challenges another's right to register and become a qualified voter should be compelled to comply strictly with the terms of the statute - that the Legislature intended that challenges and applications for erasure of names should cease at noon Monday, October 19, 1936, otherwise, it would not have used the words "must be made by filing the same in the office of the Board at any time before 12:00 o'clock noon on the Monday of the second week before election.

Section 10586, R.S. Mo. 1929 sets forth the time, duties and manner in which the registration must be made and the same is conducted during the sixth week prior to the election. Thus, elapses a period of more than four weeks within which any voter

is privileged to challenge the right of another voter to be duly registered. Realizing and knowing that in a city so populous as Kansas City, the Board of Election Commissioners would have many of such applications, the Legislature saw fit to limit the time in order to give the Board ample time in which to pass on the merits of such applications and not encumber and burden the Board with such duties just prior to the election. The Legislature, realizing that much time would be consumed and that much time was necessary to pass on each application, fixed the time within which the Board should begin passing on the applications by stating: "Commence on the Thursday of the second week before such election and continue with the exception of Sunday until all such applications are heard and decided."

It would be almost a physical impossibility for the Board to carry out its multiple duties in connection with the election and at the same time be constantly receiving applications for erasure of names even unto the day of the election, and it is the opinion of this department that the Board of Election Commissioners cannot receive application for erasure of names after Monday noon, October 19, 1936.

II

Your second question requests an interpretation of Section 10568, R.S. Mo. 1929 as to whether or not said section empowers the Board of Election Commissioners, or any two members thereof, to order and conduct a recanvass of a section of Kansas City.

Section 10568 is herewith quoted in order that we may analyze the meaning of the intention of the Legislature in enacting the same:

> "Any two members of the board of election commissioners shall have power to appoint before or upon any day of registration or election such number of deputy commissioners, who must be qualified voters in the city, as they may deem necessary, to be divided equally between the two political parties for the purpose of taking a census of and ascertaining the facts and conditions relative to the residence and voting right of persons in any election precinct or precincts; and to attend and be present at and during any registration, revision of registration or election, to witness and report to

> the board of election commissioners any failure of duty or any fraud or irregularities occurring thereat; and to act as judges or clerks in any precinct in place of absent, removed, or disqualified judges or clerks; and to do and perform any and all acts which the said board or any two members thereof shall direct. Whenever any such deputy shall deem it necessary to have police protection in making any investigation or in performing any duty, he may demand of the chief, captain, sergeant, or other persons having command of the police that a policeman be furnished to accompany him and protect him in his duties, and it shall be the duty of such officer or person so having command to furnish a policeman for the purpose. If any person shall refuse or fail to answer questions or give any information possessed by him which may be asked for by any such deputy in the discharge of his duties, such person shall, upon conviction thereof, be deemed guilty of a misdemeanor and punished by a fine of not more than one hundred dollars. The deputies shall receive the sum of five dollars per day for services while actually employed."

No appellate court has ever undertaken to interpret the above section; hence, we must glean the purport of the section by its own provisions and its relation, if any, to the other sections in Article 17, Chapter 61 of the Statutes. It is our opinion that it has no relation to, nor should it be considered in connection with Section 10596, same being the section to which our ruling in your first question is referable.

Under the provisions of Section 10567, dealing with the creation of the Board of Election Commissioners and the duties of the same, said Board is empowered to employ such assistants from time to time as to promptly and correctly perform the duties of the office under the direction of the Board. We think the assistants mentioned in the section refer to those employed at the office regularly and whose duties consist mainly in office routine matters in connection with the registration.

In order that the Board may have additional assistance and as an added precaution, in order to prevent fraudulent registration and voting, the Legislature saw fit to permit additional appointments of deputy election commissioners under Section 10568, R.S. Mo. 1929. The duties of said deputy election commissioners are: (1) To take a census of and ascertain the facts and conditions relative to the residence and voting right of persons in any election precinct or precincts; (2) to attend and be present at and during any registration, revision of registration or election; (3) To witness and report to the Board of Election Commissioners any failure of duty or any fraud or irregularities occurring thereat; (4) To act as judges or clerks in any precinct in place of absent, removed or disqualified judges or clerks; (5) To do and perform any and all acts which the said board or any two members thereof shall direct.

It is well to carry in mind the provisions of Section 10569, R.S. Mo. 1929 wherein the Board is directed to divide the city into election precincts and rearrange the same at least six months before each presidential election. The duties of the Board mentioned in said section involve accumulation of much data and many investigations, and it is reasonable to assume that one of the principal duties of the deputy election commissioners is to collect data which will aid the Board in carrying out the provisions of Section 10569--in fact, we think that practically all the duties of the deputy election commissioners are to assist the Board in connection with the duties of the Board under Section 10569, R.S. Mo. 1929.

However, in addition thereto, said deputy commissioners are to assist the Board in any matter which the board shall direct during registration or on election day, and to detect and investigate fraud occurring at any time. The provision to do and perform any and all acts which the Board or any two members thereof shall direct refers, we think, to specific or individual investigations and duties which in the opinion of the Board should be done in order to conduct a legal and orderly registration and election. They are the elisors, agents, assistants and servants of the Board.

As we interpret the statute, taking into consideration the provisions of all the other statutes relating thereto, it cannot be read into the statute that the Board or any two of its members has the broad power to make a wholesale recanvass of the city or portions thereof. At the direction of the Board, through the deputy election commissioners, every person suspected of fraudulent registration or voting, all instances of fraud--in fact, every individual act on the part of a judge, voter or registrant, may be investigated, but we cannot read into the statute the power of the Board, with one stroke of the pen, to recanvass all or a portion of the city without regard to the rights of those who have been legally registered.

The Legislature has seen fit to enact statutes governing registration and voting in cities of the population of Kansas City which contain the complete procedure and which, if followed correctly and assiduously, will prevent fraud being perpetrated prior to the election. With all the powers and safeguards the Legislature has bestowed on the Board of Election Commissioners, it is possible for fraud to creep into the election and if the same has not been detected or prevented prior to election day, there is still an opportunity to prevent fraud on the day of the election, either as to registration or voting under the provisions of Section 10613, which gives each political party a right to have watchers and challengers in each precinct.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

ELECTIONS: CErtificate for county offices may be filed with county clerk not later than 10 days before election for November Election, 1936.

October 26, 1936.

10-27

FILED
6

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Mr. Beckham:

This is to acknowledge receipt of your letter of October 23d, in which you request the opinion of this Department on the question submitted. Your letter is as follows:

> "In the August Primary there was no person who offered themselves as a candidate for the nomination for the office of Assessor on the tickets of one of the major parties, which left that nomination vacant. The Central Committee has nominated a candidate for that office, and have offered to file the Certificate of Nomination with the County Clerk. The offer to file said Certificate was made on the 20th day of October, which would be fourteen days before the General election.
>
> "Will you please give me your opinion as to whether or not the Clerk is authorized to accept this Certificate of Nomination for filing and place the name of said candidate upon the official ballots to be voted for at the election November 3?"

If we understand your letter correctly, you desire to know whether or not a certificate of nomination for a county

office (in this case, Assessor) where a vacancy exists, is required to be filed with the county clerk or board of election commissioners, as the case may be, "not later than fifteen days before the election" or "not later than ten days before the election," as provided in Section 10245, R. S. Mo. 1929.

We quote from the pertinent parts of Section 10245, supra, as follows:

> "Certificates of nominations filed with the secretary of state shall be filed not more than sixty and not less than thirty days before the day fixed by law for the election of the person in nomination. Certificates of nomination herein directed to be filed with the clerk of the county court of each county shall be filed not more than sixty days and not less than fifteen days before election:

It will be noted that in the first proviso it says,

> "that in case of any vacancy in said nomination, by resignation, death or otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the secretary of state, county clerk or board of election commissioners the name or names of candidates to fill such vacancy:"

And in the next following provision, it is provided,

> "that the certificates of nomination to fill vacancy shall be filed with the secretary of state not later than fifteen days before the day fixed by law for the election of the persons in nomination, and with the board of election commissioners or county clerk not later than ten days before such election."

In the case submitted by you we understand that at the August Primary no one was nominated by one of the majority parties and that the Central Committee of that party duly certified the name of a candidate for assessor to the county clerk of that county on the 20th day of October, 1936, namely, fourteen days before the General Election.

We think that under the first proviso of Section 10245, supra, the words "or otherwise" govern such a situation as you stated in your letter, and that a certificate duly filed not later than ten days before such election would be in time. We are not unmindful of what is said in the forepart of Section 10245, down to the first proviso, but we think that under the first and second provisos of this section that certificates of nomination to fill vacancies may be filed with the Secretary of State not later than fifteen days before the date fixed for the election, for offices which must be filed in the Secretary of State's Office, but for county offices which must be filed with the board of election commissioners or the county clerk, as the case may be, they are permitted to be filed not later than ten days before such election.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

RH:EG

TAXATION & REVENUE: County Court may through prosecuting attorney and circuit judge levy special taxes to pay past due indebtedness under Section 9868, R. S. Mo. 1929.

November 24, 1936.

11-27

FILED 6

Judge Noah Bell
Presiding Judge of the County Court
Alton, Missouri

Dear Judge:

This is to acknowledge your letter of November 19, 1936, addressed to this Department, requesting our opinion on the question submitted therein. Your letter is as follows:

> "As we are in debt about $50,000 in this County and it seems as we will have to try to levy some additional tax to redeem our old warrants, I take the position the County Court can make an extra levy under Sec. 9868 Revised Statutes Missouri, 1929. Some differ with me.
>
> "Will you please give me an opinion from your office. I will be in Jefferson City, Monday 23rd. Will call at your office sometime in the afternoon."

Your question, as we understand it is whether or not additional taxes may be levied by proceeding under Section 9868, R. S. Mo. 1929, by the county court to pay past indebtedness of said county. Section 9868, provides as follows:

> "No other tax for any purpose shall be assessed, levied or collected,

except under the following limitations and conditions, viz.: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

The above section of our statute has been construed several times by the Supreme Court of this State and has been construed and authorizes and empowers a county court to levy additional taxes within the constitutional limits and for the purposes as set forth in said statute.

In the case of State ex rel. Philpott, Collector of Revenue v. St. Louis and SanFrancisco R. R. Co., 296 Mo. 518, 247 S. W. 182, l. c. 184, the court quoted approvingly from the case of State ex rel. v. Wabash R. R. Co., 169 Mo. 563 (Syl. 6), wherein it was held:

> "'A proceeding in conformity with section 7654, Revised Statutes 1889 (now 9868, our section), is proper course to pursue in order to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but a proceeding under that section does not make valid a levy in excessof the constitutional limit. What is meant by that section is that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness.'
>
> "See State ex rel. v. Ry. Co., 130 Mo. 243, 248, 32 S. W. 664; State ex rel. v. Miss. River Bridge Co., 134 Mo. 321, 338, 35 S. W. 592."

And the court in the Philpott case set forth for what purposes said money might be applied and said the following:

> "The revenue collected to pay past indebtedness must be applied to that purpose and may not be apportioned under section 12866 for current county expenditures. State ex rel. v. Hortsman, 149 Mo. 290, 297, 50 S. W. 811. Current county expenditures mean expenditures for the year for which the taxes were levied. State ex rel.

v. Payne, 151 Mo. 663, 673, 52 S. W. 412. The only tax that a county court may levy on its own initiative is that for the payment of county current expenditures, as authorized by section 12859, R. S. No other tax for any purpose shall be assessed, levied, or collected, except as authorized by section 12860. In this case the additional 10-cent levy was made by the order of the circuit judge in vacation."

Conclusion.

It is, therefore, our opinion that the county court of your county may proceed under the provisions of Section 9868, R. S. Mo. 1929, 12 Ann. Statutes, page 7942, to have additional taxes levied for the purposes mentioned in your request, but such levy must be within the constitutional and statutory limitations applicable to your county.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney-General.

CRH:EG

OLD AGE ASSISTANCE: Proposed escrow agreement in connection with the Old Age Assistance Commission of Iowa must be acknowledged, real estate described, same must be recorded with the Recorder of Deeds, [illegible] Recorder of deeds to receive regular statutory fee, and all executed according to the laws of the State of Missouri.

1-6

February 4, 1936

FILED
8

Honorable H. H. Bittinger, Manager
Property and Insurance Department
Old Age Assistance Commission
Des Moines, Iowa

Dear Sir:

This department is in receipt of your letter of January 29, inclosing a copy of an escrow agreement in connection with the Old Age Assistance Commission of the State of Iowa, also a copy of the Act. Your letter is as follows:

> "The Old Age Assistance Commission of the State of Iowa grants assistance to residents of the State of Iowa under certain conditions prescribed by statute, and in cases of those persons having real estate it is a condition to the grant of assistance to them that they agree that a lien be created on such real property as they may own in the State of Iowa or elsewhere. Under the Iowa law it has been ruled that the description of the property need not be inserted in the body of the lien before the same is filed for record in the office of the recorder of the county, or counties, wherein the grantee of assistance may own real estate.
>
> "While the filing of the type of the lien above described is considered sufficient in the State of Iowa it has been determined by

the members of the Old Age Assistance Commission that in order to avert possible litigation, or controversy in the courts of other states, a deed should be executed and delivered to an escrow agent to be held according to the conditions expressed in a form of agreement which has been written and a copy of which is enclosed herewith for your inspection.

"It is the desire of the commission that this agreement to be executed by and between the recipients of assistance and the commission be eligible for record and sufficient to give notice of a lien against the property which may be owned in your state by recipients of assistance residing in the State of Iowa.

"The members of the Old Age Assistance Commission will be greatly pleased if you will give your opinion as to whether or not this agreement will be handled by your county officers, and if so, the name of the record in which it should be placed; and also, whether it should be recorded or simply filed in order to give adequate notice to protect us from endangering our position by reason of other liens, with the exception of taxes.

"You will find enclosed herewith a copy of the old age assistance act as amended and revised which you may retain for your files.

"Thanking you in advance for your kind cooperation in this matter, we are."

We have searched our Missouri Statutes diligently in an effort to find some form of lien which might correspond

to the escrow agreement. We frankly confess that we have nothing in our statutes similar to the instrument.

Section 11543, Revised Statutes Missouri 1929, enumerates the instruments which shall be recorded and is as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law,and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father,and maiden name of the mother of such child or children."

The question arises as to whether or not the form of agreement which you present is of such nature, and granting that it is in proper form, can the same be admitted to the records of our state.

Section 3039 relates to deeds and contains the clause "or whereby any real estate may be affected," and is as follows:

> "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore

> prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Under the two sections quoted above it is possible that the escrow agreement can be recorded in our state. As stated in the beginning, our statutes do not contain any provision for creating a lien by filing, but in the event the instrument is recorded it imparts notice, as stated in Section 3040, Revised Statutes Missouri 1929, which is as follows:

> "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice."

We note the simple form of acknowledgment at the close of the agreement, and, in our opinion, the same does not conform with the acknowledgments required as contained in Section 3029, Revised Statutes Missouri, 1929, which is as follows:

> "The certificate of acknowledgment shall state the act of acknowledgment, and that the person making the same was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the instrument as a party thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; and the following forms of acknowledgment may be used in the case of conveyances or other written instruments affecting real estate; and any acknowledgment so taken and certified shall be sufficient

to satisfy all requirements of law relating to the execution or recording of such instruments:

"(Begin in all cases by a caption, specifying the state and place where the acknowledgment is taken)

"1. In case of natural persons acting in their own right:

On this ___ day of _____,19__, before me personally appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

"2. In the case of natural persons acting by attorney:

On this ___ day of _____,19__, before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D,and acknowledged that he executed the same as the free act and deed of C D.

"3. In the case of corporations or joint stock associations:

On this ____ day of _____,19___, before me appeared A B to me personally known, who, being by me duly sworn (or affirmed) did say that he is the president (or other officer or agent of the corporation or association),of (describing the corporation or association), and that the seal affixed to foregoing instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said A B acknowledged said instrument to be the free act and deed of said corporation (or association).

"(In case the corporation or association has no corporate seal, omit the words 'the seal affixed to said instrument is the corporate seal of said corporation (or association), and that,' and add at the end of the affidavit clause the words 'and that said corporation (or association)has no corporate seal.')

"(In all cases add signature and title of the officer taking the acknowledgment.)

"When a married woman unites with her husband in the execution of any such instrument, and acknowledges the same in one of the forms above sanctioned, she shall be described in the acknowledgment as his wife, but in all other respects her acknowledgment shall be taken and certified as if she were sole; and no separate examination of a married woman in respect to the execution of any release or dower, or other instrument affecting real estate, shall be required."

In the case of Williams v. Butterfield 182 Mo. 181, the Court held that a deed or other instrument not properly acknowledged should not be recorded. Therefore, we consider your form of acknowledgment to be totally invalid.

We note that the Act states it is not necessary to contain the description of the real estate affected, neither does your form of escrow agreement contain any description of the land.

We think it is necessary that the real estate concerning which the agreement is to affect should be described.

In the case of Martin v. Kitchen 195 Mo. 477, the Court said:

> "A trust deed of the N. W. ¼ of Section 7, North of Castor River, in a certain county, omitting all reference to township or range, is too indefinite to pass title, especially where it appears that the N.W. ¼ of Section 7 lies North of Castor River in other townships in the county."

And also in the case of Implement Company v. Rogers 229 S. W. 779,

> "A trust deed, describing land as being in 'township thirty (31),' is ineffectual to convey a tract in'township thirty-one (31)'. "

We note that under the terms of your Act the county recorder, which corresponds in our state to the recorder of deeds, is not entitled to any fee for such recording and indexing. We do not believe that the recorders of deeds in the various counties of the State of Missouri would be bound by that provisions of the statute and would be entitled to receive their regular recording fees.

Lastly, we think that the proposed escrow agreement would have to conform to all of the laws of the State of Missouri with respect to form and the recording of the same. The power and authority of the Legislature of the State of Iowa to pass laws which would in anywise affect the title of real estate in Missouri, can be questioned, as was said in the case of Buckner v. Finley, 7 L. ed. 528:

> "For all national purposes embraced by the federal constitution, the states and the citizens thereof are one,united under the same sovereign authority, and governed by the same laws. In all other respects,

> the states are necessarily foreign to, and independent of, each other."

And also in the case of Hanley v. Donoghue 116 U. S. l. c. 4:

> "All comity between states and citizens of different States, so far as rights, privileges and immunities are not guaranteed by the Constitution of the United States, rests on the principle that it cannot be extended, in violation of the laws and policy of the State. The extension of comity in violation of the law and policy of the State would have been an abdication of the law and sovereignty of the State, and a recognition of the superiority, not the equality, of the foreign State. Every State judged for itself, of the nature, extent, and utility of the recognition of foreign laws, respecting the state and condition of persons, and was not bound to recognize them when prejudicial to their own interests."

CONCLUSION

We are of the opinion that if the proposed escrow agreement is prepared and acknowledged in accordance with the laws of the State of Missouri, the same may be recorded by the officers in the State of Missouri known as recorders of deeds, the book being known as the Deed Records; that it will be necessary to record the instrument in order for the same to constitute legal notice.

In the event that the pensioner executes the deed mentioned in the agreement it is necessary that the same

be executed in form and in the manner as prescribed by the Statutes of the State of Missouri.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:LC

MOTOR VEHICLES: No person under age of 16 years permitted to drive motor vehicle in the State of Missouri, although perhaps in many instances more competent than many adults.

3-24

March 24, 1936.

FILED
8

Mr. E.S. Bigelow,
919 Baltimore Avenue,
Kansas City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion with respect to the following question:

> "I recently applied to the City Counselor for information as to the age at which a driver's license may be issued to minors as I was under the impression that it was governed by city ordinance. I quote from his reply:
>
> > 'The matter you refer to is covered by State statute and I am informed that the Attorney General has never given an opinion on the particular question.'
>
> "A group of youngsters has gotten the idea that all children who have reached the age of sixteen years and six months are considered sixteen in the eyes of the law and are entitled to so record their age when applying for a license.
>
> "A statement of the law from the Legal Department of the State will be very helpful and much appreciated (by the elders)."

Section 7783, R.S. Mo. 1929, subsection (i) provides:

> "Age limit of operators: No person under the age of sixteen (16) years shall operate a motor vehicle on the highways of this state."

This section of our statutes undoubtedly requires that a person shall have reached his or her sixteenth birthday before operating a motor vehicle on the highways of this state.

In the case of Gibson v. People, 99 Pac. 333, the Court in construing a statute similar to the one here under consideration held that the words "sixteen years of age or under" excludes children who have passed beyond their sixteenth birthday.

In the case of Collins v. Liddle, 247 Pac. 476, the Court gives as the reason for this type of legislation, the following:

> "We are irresistibly impelled to the belief that it was because of the known fact that vehicle traffic on the congested highways is continually fraught with more or less danger; that to operate a vehicle safely requires mental discretion and physical ability to handle and control the vehicle, especially in cases of emergency; that, in the experience of mankind, children under the age mentioned have not such mental discretion, or such physical ability and therefore are prohibited as provided in the law."

In connection with the statute above cited, we wish to call your attention to Sec. 7786, R.S. Mo. 1929, subsection (d), which provides:

> "Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two years, or

by both such fine and imprisonment."

Section 346 of the Revised Ordinances of Kansas City, Missouri as of 1928 provides:

> "No person shall drive any public or private automobile, motor car, motor vehicle or other self-propelled vehicle who is less than sixteen (16) years of age."

This, of course, is but declaratory of the State law on this subject; however, the City of Kansas City has proceeded further in this matter and has sought to protect the children of Kansas City to an even greater extent, as is clearly shown by Sec. 274 of said Revised Ordinances, which provides:

> "It shall be unlawful for minors of opposite sex to ride in any automobile between the hours of nine o'clock P.M. and six o'clock A.M. in Kansas City, Missouri, unless such persons are accompanied by a reputable person over twenty-one years of age, or unless two or more of the occupants of such automobile are children of the same parents, or parent, and are of opposite sex; or unless two of such persons are married to each other; or unless such persons are at the time engaged in the performance of an errand of necessity, or are returning directly home from the performance thereof. The adult described in this section shall be some one other than the person in charge of or driving a public automobile for hire.
>
> "In case any officer shall be uncertain as to whether the persons using any automobile are violating the provisions hereof, it shall be the duty of the persons driving such automobile upon the request of such officer to drive the same to the residence of the girl or girls in said automobile for the purpose of investigation."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the limit of sixteen years as provided in Section 7783, supra, is not arbitrary but is a reasonable exercise of the police power, and the Act restricting automobile drivers to persons over sixteen years of age is not violative of either the State or Federal Constitutions, which forbid the taking of private property without due process of law.

It may be true, and even quite possible, that some persons under the age of sixteen years are more apt than others in learning to operate motor vehicles--in fact, it would require a high degree of imagination to conceive of any one over the age of ten years being any less adept in the handling of motor vehicles than many adults who are by law permitted to do so; however, the Legislature has concluded that the "silver livery of advised age" is sufficient license to operate a motor vehicle, and we can but construe the law as it is written. The propriety, wisdom and expediency of legislation enacted in pursuance of the police power is exclusively a matter for the Legislature.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

SCHOOLS: Orphan children permitted to attend school in any district in which such have a temporary or permanent home and are unable to pay tuition fees.

January 21, 1936.

FILED
10

Miss May Bowlin
Superintendent
Cass County Public Schools
Harrisonville, Missouri

Dear Miss Bowlin:

This is to acknowledge your letter as follows:

"I shall appreciate having your advice on the following circumstance which has been brought to my attention recently:

"A mother whose daughter is teaching in one of our rural schools left her own home district in another part of the county and went to live in the district where her daughter is teaching. The two have rented a room in a home in this district and are doing light housekeeping. A few weeks ago the mother took four orphan children from the Spofford Home in Kansas City and placed three of these children in the daughter's rural school and the other one in the nearest high school. The Spofford Home pays the mother for keeping the four children. Does she have a legal right to place these children in this rural district where she, herself, is

> in a temporary home? Since the Spofford Home pays her for keeping the children, would they be wards of the Home and the Home be responsible for the tuition in both the rural district and the high school district? In other words, does this rural school have to school the three children who are attending in the home district and pay the tuition charged by the high school district which the older child is attending?
>
> "I have never had a case of this kind brought to my attention before. I know that an orphan child can attend school in any school district where he or she may have a permanent or a temporary home but the fact that this woman has only a temporary home in the district herself, and that the Spofford Home pays her for keeping the children, brings up a point of law which I prefer your opinion upon."

Section 9207, R. S. Mo. 1929, provides in part as follows:

> "The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district--said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power * * * * and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: Provided, that the following children, if they be unable to pay tuition,

> shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: * *"

The above statute is not ambiguous and plainly provides that orphan children have a privilege of attending school in any district inwhich they have a permanent or temporary home, and if unable to pay tuition.

The answer to your question, then, would be only a matter of applying the facts to the statute. The statute is for the benefit of the children and it is their temporary or permanent home that gives them the right to attend school and not the home of the person with whom they might be residing or living. It might be that the person who is being paid for the keeping of the orphan children is not a resident of the district. However, if said orphan children have a temporary or a permanent home with said person, then, in our opinion, said orphan children would have the right to attend school.

In State ex rel. v. Clymer, 164 Mo. App. 671, the Springfield Court of Appeals said the following (page 676):

> "The policy of this state is to educate, and to furnish free of charge, good schools for all children of school age, and even to compel the attendance of children thereto. * * * As said by the Supreme Court of Wisconsin in State v. Thayer, 41 N. W. 1014: 'Such children are the wards of the state, to the extent of providing for their education to that degree that they can care for themselves and act the part of intelligent citizens. To secure these ends, laws relating to public schools must be interpreted

to accord with this dominant, controlling spirit and purpose in their enactment, rather than in the narrower spirit of their possible relations to questions of pauperism and administration of estates.'

"While the statute must be liberally construed, we also recognize the fact that it would not be right to permit children living in districts whose taxpayers have neglected or refused to maintain schools to have the benefits free of charge of schools in districts wherein the taxpayers have burdendd themselves to erect school houses, employ competent teachers and maintain schools. * * *

"Prior to 1885, the statute contained none of its present provisos, but simply authorized the board to admit non-resident pupils within the district, and to prescribe the tuition fee to be paid. In 1885 it was amended by adding the proviso: 'That orphan children, or any children bound as apprentices, shall have the privilege of attending school in any district in the state of Missouri in which they may find a permanent or temporary home, without paying a tuition fee.'

"While the statute was in this language, the case of Binde v. Klings, supra, was decided by the St. Louis Court of Appeals. * * *

> in districts where they had a permanent or temporary home without paying tuition fees, and said that by admitting certain non-residents the Legislature necessarily excluded the idea that other non-residents were entitled to the privilege."

However, the present statute contains four exemptions or provisos to the general rule as to the right of the board to admit non-residents and prescribe tuition fees.

In School District v. Matherly, 84 Mo. App. 140, the Kansas City Court of Appeals, page 142, said:

> "In our opinion, to entitle one to school privileges for his children in the public schools he must bona fide reside within the school district. Coming temporarily within the district to reside during the scholastic year, for the purpose of sending children to the school of that district can not be allowed. If this defendant has such right, then all other citizens of Nodaway county, outside of Barnard, have, of course, the same right. The result would, therefore, be that that district could be called upon to support schools for the benefit of other distinct communities. This was not contemplated by the statute."

However, the facts presented in your inquiry show that the children seeking to go to school are orphan children, and if said orphan children have a temporary or permanent home in the school district and are unable to pay tuition, then, in our opinion, said children would have a right to attend school without payment of tuition.

On the contrary, if said orphan children do not have a permanent or temporary home in the district, then of course said children cannot take advantage of Section 9207, supra. In this connection it is our further opinion that the temporary home must be bona fide and not for the mere purpose of giving the children a home in a district temporarily and during the scholastic year.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

NON-INTOXICATING BEER: City ordinances requiring applicant to be property owner is in conflict with State law on said subject, and void.

January 25, 1936 1-27

FILED 10

Mr. Wallace I. Bowers
Chief Clerk
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "Please furnish this department with an opinion on the following subject:
>
> "Does a City Council, under the provisions of section 13139-E of the non-intoxicating liquor laws of the State of Missouri, have the power to pass an ordinance requiring applicants for 3.2% beer permits to be property owners before granting said applicants 3.2% beer permits?"

Section 13139-e of the Non-intoxicating beer Law, Laws of Missouri 1935, page 396, gives the proper authorities of incorporated cities, towns and villages the right to charge for licenses issued to manufacturers, brewers, wholesalers and retailers of non-intoxicating beer within their limits, and to make and enforce ordinances for the regulation and control of the sale of non-intoxicating beer within their limits, not inconsistent with the provisions of the Non-intoxicating Beer Act. Said section reads, in part, as follows:

> "The Board of Aldermen, City Council or other proper authorities of incorporated cities, towns and villages including the City of St.Louis may charge for licenses issued to manufacturers, brewers, wholesalers, and retailers of non-intoxicating beer within their limits,which charge for licenses shall not exceed one and one-half times the amount charged for a state license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of non-intoxicating beer within their limits, not inconsistent with the provisions of this Act, and provide penalties for the violation thereof.* * * * * * "

The only qualifications required of an applicant to sell non-intoxicating beer are found in Section 13139-z-17, Laws of Missouri 1935, page 400, which reads as follows:

> "Before any permit authorized by this article other than a manufacturers' permit shall be issued and delivered to any applicant therefor, such applicant shall take and subscribe to an oath that he will not allow any intoxicating liquor of any kind or character,including beer having an alcoholic content in excess of 3.2 per cent by weight, to be kept, stored or secreted in or upon the premises described in such permit, and that such applicant will not otherwise violate any law of this state while in or upon such premises."

In the case of St.Louis v. Tielkemeyer 226 Mo. l. c. 140, the Court said:

> "It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.
>
> "The city of St.Louis has express authority under its charter 'to license, tax and regulate . . . saloons, beer houses, tippling houses, dramshops and gift enterprises.' (Art.3,sec.26,clause 5.)
>
> "The State, however, has the sovereign power to regulate those matters and its authority being paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject."

In the case of State ex rel. v. McCammon 111 Mo. App. l. c. 630,631, the Court said:

> "We are of the opinion that the charter powers relied upon do not confer authority upon the city to overturn the general law on the subject of dramshops. Indeed, the charter itself, as above quoted, shows that the city has no power to pass ordinances on any subject which are repugnant to the laws of the State. So therefore when the State law says that a license shall be granted on the petition of two-thirds of the inhabitants of a block, the board of aldermen have not the authority to say that there shall be a petition of two-thirds of the entire city. Though the city is authorized to regulate a dramshop, it cannot regulate it in those particulars which would be inconsistent with the regulations made by the State."

And, further, at l. c. 631, 632, it was said:

> "'The powers conferred upon a municipal corporation must be exercised in conformity to the general laws of the State, unless it is clear that the exclusive control of the subject is given to the municipality or that the general law is to be superseded or suspended by the charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic does not repeal the general laws on that subject. The rule is that the municipal ordinances cannot set aside, limit or enlarge the statute law of the State, unless its power to do so can be shown in express terms or by necessary implication.' And again at section 224 the same author says:
>
> "'Whenever a change of policy takes place in the State on the subject of its liquor legislation, by the adoption of a different system - as when general prohibition, or prohibition for particular localities is enacted by a constitutional amendment of general statute, or when the Legislature provides a uniform and general system for the licensing of the traffic - this has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them.'. "

In view of the above, it is the opinion of this department that an ordinance requiring applicants for 3.2% beer permits be property owners would be in conflict with Section 13139-z-17, supra, and therefore void because inconsistent with the State law on the same subject.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

INHERITANCE TAX: Whether or not a bequest to a hospital is exempt is a question of fact to be determined by reference to the corporate charter and purposes of the corporation.

January 28, 1936

FILED 10

Hon. F. C. Bollow
Prosecuting Attorney
Shelbyville, Missouri

Dear Sir:

This department is in receipt of your letter of January 21 requesting an opinion as to the following state of facts.

> "A lady recently died in this county leaving her entire estate, consisting of about $15,000.00, to Barnes Hospital of St.Louis. It is the contention of the Hospital that said fund is not subject to income tax and that the said hospital is a charitable institution. It is my contention that the estate is subject to a 5% income tax to be paid the State of Missouri. My understanding is that while Barnes Hospital does, of course, as all hospitals do, some charity work, it is not strictly a charitable institution, and charges fees for work wherever it is possible to receive them. I should very much appreciate your opinion on the matter, in that I am quite sure that on the strength of your opinion the matter here will be determined without the expense of further contest."

I.

In your request you use the words "income tax". Under no consideration could the bequest be subject to the income tax laws of the State of Missouri, as Section 10119,

Revised Statutes Missouri 1929, provides in part as follows:

> "The following income shall be exempt from the provisions of this article:
> * * * * * * *
> (3) The value of property acquired by gift, bequest, devise or descent
> * * * * * * * *."

We assume, therefore, that the words "income tax" are the result of a typographical error, and that it is your contention that this bequest is subject to the Inheritance Tax Laws of the State of Missouri.

II.

(a) The principles of statutory construction.

At the outset of the discussion of the problem of inheritance taxation here presented it must be remembered that as a general rule it has long been held that statutes providing for exemptions should be strictly construed against the exemptions and in favor of the tax. In other words, exemptions are simply and purely an act of grace, and all reasonable doubt should be resolved in favor of the taxing power.

This principle is well stated by the Supreme Court of the United States in the case of Yazoo and Miss. V. Ry. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. Rep. 240:

> "Exemptions from taxation are not favored by law,and will not be sustained unless it clearly appears to have been the intent of the legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except

> for very circumstantial reasons; and while, as we have held in many cases, legislatures may in the interest of the public contract for the exemption of other property, such contract should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power."

Consonant with the principles as heretofore outlined it stands beyond cavil that in order for legislation to relieve any species of property from its portion of taxation, such legislation should be so clear that there can be neither reasonable doubt nor controversy about its terms. Riesterer v. Land Company, 160 Mo. 141; Beale on Cardinal Rules of Interpretation, page 232.

(b) The purposes for which the corporation is formed governs as to its exemptions from taxation.

Section 602, Revised Statutes Missouri 1929, provides as follows:

> "When any property, benefit or income shall pass to or for the use of any hospital, religious, educational, Bible, missionary, scientific, benevolent or charitable purpose in this state, or to any trustee, association, or corporation, bishop, minister of any church, or religious denomination in this state, to be held and used and actually held and used exclusively for religious, educational, or charitable uses and purposes, whether such transfer be made directly or indirectly, the same shall not be subject to any tax, but this provision shall not apply to any corporation which has a right to make dividends or distribute profits or assets among its members."

In order to determine whether or not a bequest to

this corporation is exempted under Section 602, supra, it is necessary to determine the status of the corporation and to ascertain the purposes for which it was incorporated. It must also be remembered that the exemption does not apply to any corporation which has a right to make dividends or distribute profits or assets among its members, or to those bequests not held and used exclusively for religious, educational or charitable uses or purposes.

CONCLUSION

In view of the foregoing, it is the opinion of this department that whether or not the bequest of fifteen thousand dollars ($15,000.00) to Barnes Hospital of St.Louis is exempt from the Inheritance Tax Laws of Missouri, by reason of Section 602, Revised Statutes Missouri 1929, is a question of fact. It would be useless to cite cases involving this point for the reason that each case must, of necessity, turn on the language of the exemption statute and the provisions of the corporate charter or the purposes of the corporation (Gleason and Otis "Inheritance Taxation"). The principle is simple enough; the application to concrete facts alone is difficult.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JWH:LC

LIQUOR CONTROL DEPARTMENT:
APPROPRIATIONS: Legislature did not appropriate for the payment of burglary or theft insurance

July 28, 1936 7-30

FILED 10

Mr. W. H. Bouchard
Chief Auditor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Bouchard:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "On the first of this month we presented to the State Auditor a bill for $113.00 for the payment of burglary and robbery insurance on our St.Louis office, and he refused to pay, stating that your office advised him to do so.
>
> "Our St.Louis office is located on the twelfth floor of the Mart Building, and handles from $1,000.00 to $25,000.00 daily. The men in this office are not bonded, as the Auditor also refused to pay the premium on their bonds. If this office should happen to be burglarized or robbed, we have no way of recovery and the State of Missouri would be the loser by what ever amount was taken.
>
> "We would like to have your opinion of the following: In view of the facts stated above,

does not our appropriation under D-Operations, page 103, Laws of Missouri, 1935, give the Auditor the authority to pay the premiums on policies and bonds for the protection of the State.

"We are in urgent need of this opinion as the payment of these bills is being upheld, and the State is without protection in the St.Louis branch of this department, pending the issuance of this opinion.

"Thanking you for the many past favors and friendly advice, I am "

Article X, Section 19, of the Constitution of Missouri, provides as follows:

"No money shall ever be paid out of the treasury of this State,or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor,within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Section 11421, Revised Statutes Missouri 1929, reads:

> "No warrant shall be drawn by the auditor or paid by the treasurer, unless the money has been previously appropriated by law; nor shall the whole amount drawn for or paid, under any one head, ever exceed the amount appropriated by law for that purpose."

In 59 Corpus Juris, Section 390, pages 250, 251, it is said:

> "In some states, there are constitutional provisions requiring a distinct statement of the purpose of an appropriation in the bill making such appropriation; and, according to some authority, a requirement of specific appropriations has been held to be of equivalent force in requiring a definite statement of the purpose of appropriations. * * * *"

Whether or not you may insure the money collected by your office in St.Louis against burglary or theft, depends on whether or not the Legislature has appropriated funds specifically providing for the payment of such insurance. In construing an appropriation measure the courts have held that such appropriation must be strictly construed.

In Meyers v. Kansas City 18 S. W. (2d) 900, the court was construing an appropriation made by the Council of Kansas City, and,at l. c. page 901, said:

> "Another general rule in the construction of statutes, applicable as well to muni-

> cipal ordinances, is that acts of the character here under review are to be strictly construed. The limitation upon the use of the appropriation in proposition eight is such, by reason of its terms, that the invoking of the general rule is not necessary."

The Legislature, in Laws of Missouri 1935, pages 102, 103, Section 33, appropriated for your department a total amount of $406,000.00. The appropriation is divided into three sub-divisions: (a) Personal Service, (b) Additions, (d) Operation. The only sub-division out of which the insurance in question might possibly be paid is sub-section (d) entitled 'Operations,' which reads as follows:

> "D. Operation:
>
> General expenses consisting of communication, binding and printing, transportation of things, travel, stationery, office supplies, and other general and miscellaneous expenses. . . . . $200,000.00 "

We are of the opinion, however, that this section of the appropriation act is not broad enough and specific enough to entitle you to take out insurance on the moneys in question. It is true, at the outset, that the Legislature used the term 'general expenses;' immediately after the use of this term, however, it enumerates the items which the general expenses consist of. The term 'general expenses' is a broad term, and, used by itself, would be broad enough to include all the items enumerated in section (d). When the Legislature, however, used the words 'general expenses' by the enumeration of certain items we believe they limited and qualified the scope of the term 'general expenses.' If the Legislature had not intended

to limit the term 'general expense' and confine it to the enumerated items then it would have been useless for the Legislature to have made such an enumeration, because the term 'general expense' unrestricted would have been sufficiently broad to cover all the items listed in section (d).

At the close of Section (d) appears the words 'other general and miscellaneous expenses.' We do not believe, however, that these words are of any assistance in making the appropriation cover the question of insurance. The general rule is that where general words are followed by particular words the general words will be restricted and limited to the particular words used. This rule has been applied in the construction of appropriation. In State ex rel. v. Dierkes 214 Mo. 578, the Supreme Court had for consideration an appropriation under the St.Louis charter. The words in that appropriation which the relator relied upon were, "other expenses of the house of delegates.' The Court, in discussing the question, at l. c. page 591 said:

> "Now take either of the two appropriation ordinances in evidence,for they are both the same in words, except as to the last clause, we have no specific appropriation for this work or for this relator. Relator contends that the words 'other expenses of House of Delegates,' are sufficient to authorize the payment of this money out of the unexpended balance in that fund. The whole clause of the ordinance reads:
>
> "'Publishing proceedings, printing, stationery, office expenses, furniture, rent of telephone and other expenses, of House of Delegates. . $8,000.00.'
>
> "To our mind the rule of ejusdem generis fully applies here. The term 'other expenses' means <u>expenses of the character theretofore mentioned in that clause of the appropriation act</u> and does not

include an appropriation for work of the character performed by relator. To hold that it did include such would be to nullify the provisions of Section 14, Article 5, of the city charter, supra."

Following the above decision, we are of the opinion that the moneys appropriated by section (d) can only be used for the purposes enumerated in section (d) or for items by reason of similarity of which it can be said come within the enumerated classes under the rule of ejusdem generis. We do not believe that burglary or theft insurance is similar enough to the enumerated items to bring it within the provisions of the appropriation. It could not be said that insurance comes within the classification of communication, printing and binding, stationery, transportation of things, travel, or office supplies. It may be and undoubtedly would have been good business for the State to have appropriated money for the payment of burglary and theft insurance on the moneys collected by your branch offices. However, the State, in many instances, has not and does not insure its personal and real property. Failure of the State to appropriate moneys for the payment of insurance premiums evidences an intention on its part that it desires to carry its own insurance.

We are, therefore, of the opinion that the State has not appropriated funds out of which you may pay for the insuring of the moneys collected by your branch office in St. Louis against burglary and theft.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

COMMISSIONER OF AGRICULTURE:
STATE BOARD OF HEALTH:

EMBARGO: Neither has authority to issue embargo prohibiting shipment of apples into this state.

January 18, 1936.

1-23

FILED
11

Mr. J. C. Breshears,
Commissioner,
Department of Agriculture,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "We have just received by telegram from Fred Merrill of Chillicothe, Missouri, the following information:
>
> "'Western shippers of defrosted apples are undermining price schedules of Missouri grown apples by dumping this inferior quality fruit at low prices stop. Peddlers remove lids stamped to show low keeping quality and buyers are deceived by low prices stop. Nebraska reported to have placed embargo and Kansas is preparing same can we institute immediate proceedings to protect our market against dumping?'
>
> "It appears that Missouri apple growers are going to suffer heavy financial loss, and we pray you to promptly advise us if Missouri has any law under which action can be taken concerning this matter. If so, under what section or sections, and what Department of our State Government is vested with such authority?"

We construe your question to be, has your department or the State Board of Health the authority to issue an embargo prohibiting the shipment into and sale within Missouri of apples which are of an inferior keeping quality, and which apples are later sold to the consuming public of Missouri without such consuming public knowing that such apples are of such grade, the apples, when sold to such consuming public, having been taken out of their original crates which show the true keeping quality thereof and being sold from other containers?

Laws of Missouri, 1933, page 166, abolishes the State Board of Agriculture and a number of other boards and transfers their duties to the Commissioner of Agriculture, and the duties of such abolished boards are continued in the State Department of Agriculture and the Commissioner of Agriculture.

Under the provisions of the Missouri Plant Law, Section 12378, R. S. Mo. 1929, provides that the board may establish a quarantine and make rules and regulations pertaining thereto.

Section 12379 provides that when the board finds that there exists in the state a dangerous insect pest or a dangerous plant disease new to the state, and that its spreading should be prevented, controlled or eradicated, it may adopt provisions to that end. However, this is under the Article dealing with the Missouri Plant Law and is not authority for your preventing the dumping of apples into this state from outside of the state.

Section 12626, Laws of Missouri, 1933, page 169, transferring the duties of the State Marketing Bureau to the Commissioner of Agriculture, provides in part as follows:

> "Said commissioner shall have authority to conduct shipping point and terminal market grading and inspection service alone or in co-operation with the U. S. department of agriculture and to license inspectors, issue certificates on the products inspected, determine and collect and pay a reasonable service charge on the work done, and do each and every act necessary to render said grading and inspection service of greatest value to Missouri agriculture."

Under the Article dealing with Standardization and Inspection of Agricultural Products, Section 12629, R. S. Mo. 1929, empowers the commissioner, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all agricultural products grown or produced in this state, and to fix and promulgate official standards for containers of farm products and change any of them from time to time.

Sections 12630 and 12631 authorize the commissioner to promulgate standards or any alterations or modifications of standards and to determine the date of effectiveness thereof, and authorize the commissioner to promulgate as the official standard for this state for any agricultural product or container the standard for such product or container which may have been promulgated or announced therefor under the authority of Congress, and authorize him to cooperate with the United States or any department thereof.

Section 12638 provides as follows:

> "If any quantity of any agricultural product shall have been inspected and a certificate issued hereunder showing the grade, classification, quality or condition thereof no person shall represent that the grade, classification, quality or condition of such product at the time and place of such inspection was other than as shown by such certificate. Whenever any standard for the grading or classification of any agricultural product becomes effective under this article, it shall be unlawful in or in connection with any transaction or transactions involving such product in commerce subject to the jurisdiction of this state or in any publication in this state of a price or prices for or in connection with such transaction or transactions for any person to indicate the grade of any agricultural product which is of or within the grades fixed in said standard for such product by any name, description or designation or any system of names, descriptions or designations not used in said standard. Whenever any standard for a container for an agricultural product becomes effective under this article, no person

> thereafter shall manufacture for commerce within the jurisdiction of this state, or sell, ship, or offer for sale in such commerce any container, either filled or unfilled, to which the standard is applicable which does not comply with such standard subject to such tolerances as may be permitted under this article. Any person violating this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $25.00 or not more than $100.00."

Section 12639 provides as follows:

> "Prosecutions under this article shall be begun and carried on in the same manner as other prosecutions for misdemeanors in this state."

Under the Article dealing with Commission Merchants, Section 12648, among other things, defines "farm products" as follows:

> "The term 'farm products' shall, except as otherwise provided, include all agricultural, horticultural, vegetable and fruit products of the soil, meats, marine food products, poultry, eggs, dairy products, wool, hides, feathers, nuts, and honey, but shall not apply to seeds sold at retail, nor include timber products, tea, coffee, or pelts of fur-bearing animals."

Sub-section (c) thereof defines the term "commissioner" as follows:

> "The term 'commissioner' as herein used, shall mean the state marketing commissioner or any officer, employe or agent of the state board of agriculture, or the legal successor of the state board of agriculture, designated by the state marketing commissioner to perform or assist in the performance of any of the duties vested in the 'commissioner' by this article."

Section 12654 provides as follows:

"The commissioner shall have power:

"(a) Before granting a license to any applicant, to investigate the character and standing of such applicant.

"(b) Upon the receipt of any verified complaint from any person pecuniarily interested, showing or tending reasonable to show any violations of any of the provisions of this article, to investigate fully any transaction involving solicitation, receipt, sale or attempted sale of any farm products; in furtherance of any such investigation, to require the production of and inspect or take copies of that portion of the ledgers, books, accounts, memoranda and any other documents belonging to or under the control of any commission merchant and bearing upon such transaction; and in the course of and in furtherance of such investigation to require of any commission merchant a sworn statement of all the material facts relating to any such transaction. It shall be the duty of every commission merchant, upon reasonable request of the commissioner to produce for his inspection memoranda and other documents aforesaid, and to make and deliver to the said commissioner upon his request a sworn statement of all the material facts.

"(c) Upon reasonable grounds for believing that any commission merchant has committed some act, or is in such a condition, as to justify the revocation of his license under the provisions of this article, to cite such commission merchant to appear before the commissioner and show cause why his license should not be revoked for the reasons specified in such citation. Service of the citation may be personally or by mail, at least seven days before the hearing, which shall be held in the city, village or township in which is situated

the place of business of the licensee. The commissioner, at such hearing, shall have power to administer oaths to and take the testimony of parties, and any witnesses there produced for or against the licensee. Within ten days after the hearing, the commissioner shall render his decision, dismissing the proceedings or revoking the license. It shall be the duty of the commissioner, immediately on the entry of such decision to send by registered mail a copy thereof to the licensee, at the latter's business address."

Section 12655 provides as follows:

"No person, firm, exchange, association or corporation shall receive or offer to receive, sell or offer to sell on commission within this state any kind or farm products without a license, except as in this article permitted. No person, firm, exchange, association or corporation, being a commission merchant in farm products shall (a) knowingly impose any false or fictitious charge for handling or services in connection with farm products, or (b) with intent to defraud, fail to account or make settlement therefor promptly and properly, or (c) with intent to deceive, make any material false statement or statements as to market conditions, or (d) enter into any combination to fix the prices of farm products, or (e) with intent to defraud, make any material false statement or report as to the grade, condition, markings, quality or quantity of goods, received, or (f) without a license, advertise or hold himself, themselves or itself out as a commission merchant in farm products, or (g) directly or indirectly purchase for his, their or its own account, goods received for sale on commission without prior written authority from the consignor, or fail promptly to notify the consignor of any such purchase on his, their or its own account, or fail forthwith to enter any such transaction or

purchase on the record or account of sales: (Provided, that clause (g) shall not be construed as prohibiting any commission merchant from taking to account of sales, in order to close his day's business, miscellaneous lots or parcels of farm products remaining unsold, if such commission merchant shall forthwith enter such transaction in his account of sales); or (h) willfully fail or refuse to comply with any provision of this article; and every person, firm, exchange, association or corporation violating any of the provisions of this section, shall be guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty nor more than five hundred dollars. Provided, however, that nothing in this section is intended, or shall be construed, as limiting or repealing the application of any other penal statutes covering or embracing the acts herein denounced."

If authority is conferred on the Commissioner of Agriculture by law to place such an embargo, it must be by a statute passed by the Legislature, and the nearest statutory provision pertaining to such power that we find is Section 12626, Laws of Missouri, 1933, page 169, empowering the Commissioner of Agriculture to conduct shipping point and terminal market grading and inspection, issue certificates on the products inspected, determine and collect and pay a reasonable service charge on the work done, "and do each and every act necessary to render said grading and inspection service of greatest value to Missouri agriculture."

It does not appear that this provision is broad enough to authorize such commissioner to place an embargo against such shipment into or sale in Missouri of such products. From an examination of the statutes, we find no authority lodged in the Food and Drug Commissioner to place such an embargo. There are numerous provisions authorizing local prosecution by the respective prosecuting attorneys for violation of the laws pertaining to the rights and duties of the Commissioner of Agriculture and the act relating to the Food and Drug Commissioner, but these are matters of prosecution in the counties where the violations occur.

Until such time as the Legislature passes a law authorizing the Commissioner of Agriculture or other officer to place an embargo against the shipment of apples into Missouri, no authority therefor exists.

CONCLUSION

It is our opinion that neither the Commissioner of Agriculture nor the Food and Drug Commissioner of Missouri has authority to place an embargo prohibiting the shipment into or sale within Missouri of apples which are of an inferior keeping quality, and which apples are later sold to the consuming public of Missouri without such consuming public knowing that such apples are of such grade, the apples, when sold to such consuming public, having been taken out of their original crates which show the true keeping quality thereof and being sold from other containers.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

Bureau of Agriculture. Moneys collected by Ag. Bur. shall be Deposited daily in St. Treas. & can be legally paid out only pursuant to an Appr. by Gen. Assy

430

April 20, 1936.

FILED
11

Hon. J. C. Breshears,
Commissioner of Agriculture,
Jefferson City, Missouri.

Dear Sir:

This acknowledges receipt of your letter of April 8, 1936, which is as follows:

> "There has arisen a rush request for the making of a three-cornered agreement between the Bureau of Agricultural Economics of the U. S. Department of Agriculture, the Missouri College of Agriculture, and this Department, for 'a grading service on dressed poultry and eggs'--and this brings up the need for a rush opinion from you, along the lines named below:
>
> "1st--Does Senate bill 124 of the 1933 Legislature (page 415 Laws of Missouri) and Senate bill 215 (Laws of Missouri, 1935, page 189) nullify any of the provisions in section 12,635, R. S., Missouri, 1929?
>
> "2nd--Do the laws mentioned in No. 1, or other laws, nullify any other provisions in Article 19, Chapter 87?
>
> "3rd--If, in your opinion, that under above question No. 1, any of the provisions in section 12,635 are nullified, do you consider that this Department can legally receive and pay out salaries and expenses for a grading service under Senate bill No. 44 of the Laws of Missouri, 1933, pages 169 and 170, and our current appropriation found in section 41 on page 135 of the Laws of Missouri, 1935?
>
> "4th--Provided that a three-cornered agreement were made to make the College of Agriculture the receiving and disbursing agent of all moneys under such an

agreement, can this Department legally enter into such an agreement, in thelight of your interpretation of the laws cited above and all other laws applicable thereto?

"Enclosed herewith, for your reference, is a copy of the Indiana agreement, which is expressive of what the B. of A. E. and the College of Agriculture ask us to sign, subject to any mutually agreed amendments. This thanks you in advance for speedy reply."

Attached to your letter is a Memorandum of Agreement of Purdue University Agricultural Experiment Station and the Federal Bureau of Agricultural Economics with reference to Federal-State Grading Service on Dressed Poultry and Eggs, which we are returning herewith.

From your letter and from personal discussion with you, we construe your question to be this: Does your Department have authority, having collected under the provisions of Section 12635, R. S. Mo. 1929, "all fees and moneys collected or received by employees or agents of the state marketing bureau," to pay out the same direct to the employees, agents, etc., or should those collections be paid into the state treasury and only expended pursuant to an appropriation made by the Legislature?

Section 12635, R. S. Mo. 1929, provides as follows:

"The commissioner shall exercise due care to the end that, as intended in this article, costs of actual shipping point inspections made shall be paid from the moneys or fees contributed by those applying for the service, thereby constituting said direct services self-supporting and not a burden upon the state treasury. And in carrying out the provisions of this article it shall be understood that all fees and moneys collected or received by employes or agents of the state marketing bureau, whether acting solely under the authority of said bureau or under the joint authority of said bureau and the U. S. department of agriculture, do represent reasonable charges and costs for definite services rendered and are therefore not to be considered as revenue to be paid into the state treasury under the meaning of the Constitution. All money representing such reasonable charges and costs for actual inspection

> services rendered at the request of the applicant therefor may be received by responsible employes or agents of the state marketing bureau and paid over to inspectors to compensate them for actual services performed as may be most convenient for the efficient conduct of the inspection service. And thecommissioner shall keep a correct and complete record of moneys thus handled and services paid for and submit same annually to the state board of agriculture at its annual meeting, and keep a copy thereof on file in his office at all times for inspection."

This section is under Chapter 87, having to do with the bureau of marketing farm products (Article 18), and having to do with standardization and inspection of agricultural products (Article 19), both of which were, prior to the 1933 act, under the jurisdiction of and were a part of the Missouri State Board of Agriculture.

Laws of Missouri, 1933, page 167, Section 12348, provides:

> "All the rights, powers and duties heretofore conferred upon and vested by law in the Missouri State Board of Agriculture and the secretary of the State Board of Agriculture in any act * * * are hereby transferred to the Commissioner of Agriculture hereby created, and the said Missouri State Board of Agriculture * * * are hereby abolished."

It further provides that where any law refers to the Missouri State Board of Agriculture, the same shall, after the passage of this act, be construed as referring to and meaning the State Department of Agriculture and the Commissioner of Agriculture, created by said act.

In 1933, Laws of Missouri, 1933, page 415, the Legislature passed a law providing that

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any lawor rule or regulation made in accordance with any law, shall, by the official authorized to receive same, * * * be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated."

In 1935, Laws of Missouri, 1935, page 189, the Legislature enacted Section 12355-a, which provides as follows:

> "All moneys collected by or through the Commissioner of Agriculture of the State Department of Agriculture from fees, licenses, permits or other earnings under any law, other than the business of the Missouri State Fair, shall be deposited daily in the state treasury to the credit of the 'Agricultural Fees Fund,' which shall be subject to appropriation by the General Assembly."

Of course, the moneys referred to in this opinion are not those arising from business of the Missouri State Fair, which latter moneys are excepted from the provisions of this section.

It will be noted that the provisions of this last expression of the Legislature, Section 12355-a, supra, are very broad and comprehend "all moneys collected by or through the Commissioner of Agriculture of the Department of Agriculture from fees, licenses, permits or other earnings under any law", other than the State Fair, and provides that said moneys "shall be deposited in the state treasury" and be subject to appropriation.

It appears that the moneys collected by your Department under the provisions of Section 12635 above come within the meaning of Section 12355-a, supra, and are moneys collected by or through the Commissioner of Agriculture of the State Department of Agriculture from fees, licenses, permits or other earnings under law, and should be deposited daily in the state treasury to the credit of the "Agricultural Fees Fund", and that the same are subject to be paid out only on appropriation by the General Assembly.

CONCLUSION

It is our opinion that you are not authorized to pay out funds collected by your Department under authority of Section 12635, supra, as fees and money collected or received by employees or agents of the State Marketing Bureau, whether acting solely under the authority of said bureau or under the joint authority of said bureau and the United States Department of Agriculture, but that the law contemplates that such collections

received by your Department and all moneys collected by or through your Department from fees, licenses, permits or other earnings under any law, other than from the State Fair, shall be deposited daily in the state treasury to the credit of the "Agricultural Fees Fund", and that the same can be legally paid out by you only pursuant to an appropriation by the General Assembly.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

ELECTIONS: Members of C. C. Camps are entitled to vote in the primary if they possess the necessary qualification. Elections Judges can challenge their right to vote and reject their vote if illegal.

- -

July 30, 1936.

7-30

FILED

Honorable James E. Brisco
Palmyra, Missouri

Dear Sir:

You recently made a request through Mr. McIntyre of General McKittrick concerning the right of members of Citizens Conservation Camps to vote in the coming primary.

This matter was before our Department several times during the 1934 election, and we have consistently ruled that the members of the Conservation Camps were entitled to vote. Enclosed are two opinions, one to Honorable Wilbur C. Buford, Game and Fish Commissioner, and one to Honorable James P. Aylward, Chairman, Democratic State Committee, concerning members of the State Transient Camps being permitted to vote.

Bearing in mind the qualifications set forth in Section 10178 R. S. Mo. to wit: That the elector must have resided in the State one year immediately preceding the election, and shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election. The officer in charge of the election may demand these qualifications from each member of the camp before he permits them to vote. Under Section 10309 R. S. Mo. 1929, members of the C. C. Camp may be challenged on their right to vote.

It has been suggested that the members of the C. C. Camps may be disqualified under the priviso of Section 10178 R. S. Mo. 1929, to wit: "Provided however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state;" might be applicable to the members of such camps. We do think, and it has been so fuled by officials of Washington, D. C. that the members of such camps are not in anywise in the regular army or navy of the United States. Section 10178, supra, is also to the effect "that no person

while kept in any poorhouse or other asylum at public expense, * * * * shall be entitled to vote." We do not think this priviso in anywise prevents members of the C. C. Camps from exercising their right of franchise while the government keeps the members in camps, feeds and clothes them, yet it pays each member a monthly salary. Therefore, theorically if not actually, the members are paid for their labor and not kept at public expense within the meaning of the Statute.

We are, therefore, of the opinion that if the members of the C. C. Camps present themselves for voting in the coming primary they are entitled to vote, if they possess the statutory qualifications. They may be placed under oath and examined by the election officials, and if found not possessed of the qualifications they may be legally refused the right to vote.

Yours very truly

OLLIVER NOLEN
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

ON:H



BOUNDARIES: The Supreme Court of the United States has jurisdiction in a suit between two states to determine boundary line.

September 3, 1936.

9-5

FILED
11

Hon. G. R. Breidenstein,
Prosecuting Attorney,
Clark County,
Kahoka, Missouri.

Dear Sir:

We wish to acknowledge your letter of August 31st wherein you state as follows:

> "On the Northeast side of Clark County the Des Moines River forms the boundary between this County, and Lee County, Iowa. It seems that at one time many years ago, the Des Moines emptied into the Mississippi some distance South of where it does now, and much nearer to Alexandria than now. During flood stage the river broke over and formed a new channel so that there is a piece of land now south of the Des Moines which was North of the Des Moines before this time. Some of this land is assessed for taxes in Lee County and some in Clark County, Missouri.
>
> "There have been times when an ejectment suit would be instituted in the Circuit Court of Clark County, Missouri, judgment rendered for plaintiff and later an order of the District of Court of Lee County, Iowa, which in substance would nullify the order of the Missouri court.
>
> "The trouble is that we do not know where the boundary line between the two states is. The question I would like to ask is this. What would be the proper procedure for me to take to have this boundary line made known? Could any suit be started in Federal Court which would settle this matter? I do not

think the matter can ever be settled by agreement of any commission.

"I would appreciate very much an opinion from you in regard to this."

59 C. J., Sec. 30, subdivision a, page 63, sets out the proceedings to be followed in a suit between two states to determine the boundary line, thus:

"A question of boundary arising between the United States and one of the states, or between two states is not of a political nature and is susceptible of judicial determination. The United States supreme court has original jurisdiction of suits between two states, or between the United States and a state, to determine a state boundary.

"Nature and conduct of suit. Such suit may be brought by a bill in equity and is to be conducted, as a general rule, according to the rules of pleading and practice of the court of chancery, the court acting, ordinarily, in such disputes in the same manner as in the determination of like matters between private individuals. By reason, however, of the dignity of the parties and the importance of the interests involved, such controversies are not to be decided upon mere technicalities, but the chancery rules should be so molded and applied as to bring the cause to a hearing on its real merits, in the absence of legislation particularly prescribing the procedure to be followed; and thus the court will not be obliged to apply the same rules as to parties, or the time of answering, or the effect of laches or the lapse of time.

"Award or decree fixing boundary. As a mode of settling the respective rights of the parties an issue at law may be directed, or a commission awarded, or, if the court is satisfied without either, it may itself determine the boundary.

> "Costs. The costs of the suit will be equally divided between the two states where the matter involved is a governmental question in which each party has a real and vital yet not a litigious interest."

And in 25 C. J., Sec. 192, page 859, we find this statement as to the jurisdiction of the United States Supreme Court to settle disputes as to state boundaries:

> "For the supreme court to entertain jurisdiction of a suit on the ground that it is between two states, a controversy must exist in the result of which the states are directly interested. This jurisdiction is most frequently invoked for the settlement of disputes as to state boundaries."

In the case of Virginia v. West Virginia, 78 U. S. 39, l. c. 53, the Supreme Court of the United States, speaking through Justice Miller, said:

> "The first proposition on which counsel insist, in support of the demurrer is, that this court has no jurisdiction of the case, because it involves the consideration of questions purely political; that is to say, that the main question to be decided is the conflicting claims of the two States to the exercise of political jurisdiction and sovereignty over the territory and inhabitants of the two counties which are the subject of dispute.
>
> "This proposition cannot be sustained without reversing the settled course of decision in this court and overturning the principles on which several well-considered cases have been decided. Without entering into the argument by which those decisions are supported, we shall content ourselves with showing what is the established doctrine of the court.
>
> "In the case of Rhode Island v. Massachusetts, 12 Peters, 724, this question was raised, and Chief Justice Taney dissented from the

judgment of the court by which the jurisdiction was affirmed, on the precise ground taken here. The subject is elaborately discussed in the opinion of the court, delivered by Mr. Justice Baldwin, and the jurisdiction, we think, satisfactorily sustained. That case, in all important features, was like this. It involves a question of boundary and of the jurisdiction of the States over the territory and people of the disputed region. The bill of Rhode Island denied that she had ever consented to a line run by certain commissioners. The plea of Massachusetts averred that she had consented. A question of fraudulent representation in obtaining certain action of the State of Rhode Island was also made in the pleadings.

"It is said in that opinion that, 'title, jurisdiction, sovereignty, are (therefore) dependent questions, necessarily settled when boundary is ascertained, which being the line of territory, is the line of power over it, so that great as questions of jurisdiction and sovereignty may be, they depend on facts.' And it is held that as the court has jurisdiction of the question of boundary, the fact that its decision on that subject settles the territorial limits of the jurisdiction of the States, does not defeat the jurisdiction of the court.

"The next reported case, is that of Missouri v. Iowa, 7 Howard, 660, in which the complaint is that the State of Missouri is unjustly ousted of her jurisdiction, and obstructed from governing a part of her territory on her northern boundary, about ten miles wide, by the State of Iowa, which exercises such jurisdiction, contrary to the rights of the State of Missouri, and in defiance of her authority. Although the jurisdictional question is thus broadly stated, no objection on this point was raised, and the opinion which settled the line in dispute, delivered by Judge Catron, declares that it was the unanimous opinion of all the judges of the court. The Chief Justice must, therefore, have abandoned his dissenting doctrine in the previous case.

"That this is so is made still more clear by the opinion of the court delivered by himself in the case of Florida v. Georgia, 17 Id. 478, in which he says that 'it is settled, by repeated decisions, that a question of boundary between States, is within the jurisdiction conferred by the Constitution on this court.' A subsequent expression in that opinion shows that he understood this as including the political question, for he says 'that a question of boundary between States is necessarily a political question to be settled by compact made by the political departments of the government . . . . But under our form of government a boundary between two States may become a judicial question to be decided by this court.'

"In the subsequent case of Alabama v. Georgia, 23 Howard, 505, all the judges concurred, and no question of the jurisdiction was raised.

"We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two States of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding."

From the foregoing, we are of the opinion that the Supreme Court of the United States has jurisdiction to settle the dispute as to the boundary line between Missouri and Iowa, and that the procedure to be followed is the same as set out in the above citation of authority.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

CITIES: Boards of Aldermen of cities of the 4th Class ... only select an Acting President of the Board in the absence of Mayor or vacancy in office of Mayor.

November 10, 1936.

11-11 FILED 11

Mr. C. D. Bray
City Attorney
City of Campbell
Missouri

Dear Mr. Bray:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "'Sec. 6961. BOARD TO SELECT AN ACTING PRESIDENT, WHEN. -- In the absence of the mayor, the board shall elect one of their own number toooccupy the place temporarily, who shall be styled "acting president of the board of aldermen." (R. S. 1919)
>
> "'Sec. 6962. ACTING PRESIDENT TO PERFORM DUTIES OF MAYOR, WHEN.-- When any vacancy shall happen in the office of mayor by death, resignation, removal from the city, removal from office, refusal to qualify, or from any other cause whatever, the acting president of the board of aldermen shall, for the time being, perform the duties of mayor, with all the rights, privileges, powers and jurisdiction of the mayor, until such vacancy be filled or such disability be removed; or in case of temporary absence, until the mayor's return. (R. S. 1919)
>
> "'Sec. 24. OF THE PRESIDENT AND BOARD OF ALDERMEN.-- In the absence of the Mayor the Board of Aldermen shall elect one of their number to occupy the place temporarily, and who shall be styled "Acting President of the Board of Aldermen." He shall, for the time being, perform the duties of the Mayor, when any vacancy shall happen in the office of Mayor, from any cause whatever until such vacancy be filled or until the temporary disability shall have been removed or in

case of temporary absence, until the Mayor returns. (Ordinance of the City of Campbell)"

"The first two above paragraphs are sections of the Missouri statutes, and the third is a section of the ordinances of the City of Campbell.

"Immediately following each annual election, held on the first Tuesday in April, the Board of Aldermen convene with the holdover aldermen and the newly elected aldermen, if any, for the purpose of organizing for another year. At the meeting the Mayor submits his appointments for the appointive offices, subject to the approval of the Board, and the Board elects its clerk, The above quoted statutes and City ordinances also provide for the election of a president of the Board and prescribe his duties. It has been the practice of the successive boards of aldermen of the City of Campbell over a long period of years to elect the President of the Board at the same meeting in which the appointive officers are made, and the President so elected acts as mayor in the absence or disability of the mayor from time to time as such circumstances occur.

"Some of the present aldermen have challenged the validity and legality of the election of the President of the Board in this manner and contend that the Board has no authority to elect a President only in the absence or disability of the Mayor, as enumerated in the law, and they contend further that this election is required to be made on each and every occasion in the absence or disability of the Mayor, and as soon as the Mayor returns or the disability is removed, the then elected President of the Board terminates his office, and there would be no President of the Board until again when the Mayor absents himself or becomes disabled from any cause from performing his duties, at which time and on which occasion, the Board of Aldermen would reconvene and again elect a President to serve until the then absence or disability is removed and so on.

"In other words, each time the Mayor would leave the City or would be unable to perform his duties from any cause, the Board would have to be convened and elect a Presi-

> dent who would act as Mayor. It is true the language of the law apparently provides for just exactly that kind of procedure. However, this procedure would be very impractical, very cumbersome, and inconvenient, and it could easily so happen that the majority of the Board of Aldermen would not be available in case of an emergency requiring some official act of the Mayor.
>
> "If your time and facilities will permit, we would very much appreciate your opinion as to which of the procedures is correct. That is, can the Board of Aldermen at its organization meeting and when the Mayor is present and presiding elect a President of the Board who would serve throughout the year and perform the duties of Mayor on the stated occasions requiring him to do so, or should the Board convene and elect a President of the Board on each and every occasion in the absence or disability of the Mayor?"

It is to be noted from Sections 6961 and 6962, R. S. Mo. 1929, as hereinabove set forth in your request for an opinion that the Board of Aldermen, in the absence of the Mayor, shall select one of their own number to be "Acting President of the Board of Aldermen". You will also note from Section 6962, supra, in your request for an opinion that "when any vacancy *** or from any other cause whatever, the Acting President shall perform the duties of the Mayor, until such vacancy is filled or such disability removed, or, in case of temporary absence, until the Mayor's return.

In the case of Cummins v. Kansas City Public Service Company, 66 S. W. (2d), l. c., 931, the Court, in speaking of the fundemental rule relating to construction of statutes, said:

> "**** It is,**, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction. ****"

In the case of State vs. Thatcher, 92 S. W. (2d) l. c. 643, the Court had before it for construction the statute relating to St. Louis County and said:

> "***** the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied. ****"

It is obvious that the statutes in question intend that only in the event of the absence of the Mayor or in the case of temporary absence or when any vacancy shall occur in the office of the Mayor, the Board of Aldermen shall select one of their number to occupy the place of the President of the Board of Aldermen.

CONCLUSION.

In light of the above, it is the opinion of this department that the Board of Aldermen of a city of the 4th class shall select an Acting President of the Board of Aldermen to perform the duties of Mayor only in the absence of such Mayor or when any vacancy shall occur in the office of the Mayor.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General)

RCS/afj

TRADEMARKS: Descriptive terms in English or foreign language are not subject to registration under the trade-mark law.

January 30, 1936. 2-15

FILED 12

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your recent request for an opinion wherein you state as follows:

> "Under date of July 15 we had a letter from the St. Louis Products Company inquiring if the following was available as a trade-mark:
>
> "Bestmade brand, handmadelong filler, Panetella cigar.
>
> "We advised them that descriptive terms of an article are not subject to registration under the trade-mark law. They later advised that their Bestmade malt is a nationally registered brand, i. e., registered in the U. S. Patent Office, and requested that we submit the enclosed label to your office for a decision."

I.

63 C. J., page 350, lays down the following rule in determining whether a descriptive term is subject to being trade-marked:

> "No trade-mark rights may be acquired in laudatory or commendatory expressions, or in words or marks merely indicating superior excellence, popularity, or universality in use, such as 'best,' 'standard,' 'favorite,' etc., but similar words such as 'perfection' and 'ideal' have been upheld."

The question arises whether the term "BESTMADE" is a word indicating superior excellence so as to come within the rule prohibiting its being trade-marked.

63 C. J., page 351, lays down the following test in determining whether a term is descriptive or merely suggestive and arbitrary and fanciful:

> "It is a question arising in each case whether the words or marks, as used, are descriptive or whether they are merely suggestive and arbitrary and fanciful. In order to be descriptive, within the condemnation of the rule, it is sufficient if information is afforded as to the general nature or character of the article, and it is not necessary that the words or marks used shall comprise a clear, complete, and accurate description. The true test in determining whether a particular name or phrase is descriptive is whether, as it is commonly used, it is reasonably indicative and descriptive of the thing intended. The meaning which should be given is the impression and signification which is conveyed to the public."

We are of the opinion that the term "BESTMADE" as commonly used conveys the impression to the public that it is a product of superior excellence and hence comes within the rule prohibiting its being trade-marked.

Attention is directed to the case of New York Mackintosh Co. v. Flam, 198 Fed. 571, wherein the word "Bestyette" was held sufficiently distinctive to constitute a valid trade-mark for waterproof capes and cloaks. The court in its opinion said:

"The defendants claim, in the first place, that the complainant's trade-mark, 'Bestyette,' is invalid, because the word is simply descriptive of the character or quality of the goods. Undoubtedly, if the complainant had attached to its goods the sentence, 'These rain capes are the best yet made,' or some contracted form of such sentence, as, for instance, 'Best Rain Capes Yet Made,' or 'Best Yet Made,' or 'Best Yet,' the statement would be simply descriptive, and the usual commendation of a vendor, and could not be a valid trade-mark. 'Bestyette,' when spoken, sounds the same as 'Best Yet,' and undoubtedly the claim that it is merely a descriptive word has much weight. But, in trade-marks, the impression produced on the sight of the buyer is the main thing; and, upon the whole, I think that the compounded and fantastically spelled word 'Bestyette' is sufficiently distinctive to be a trade-mark. Moreover, the evidence shows that it was used exclusively by the complainant more than 10 years before registration, and therefore the provisions of section 5 of the Trade-Mark Act of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1911, p. 1459)) apply, that, in such a case, the fact that the term was originally descriptive does not prevent registration.

"The defendants also claim that, assuming that the word 'Bestyette' can be a valid trade-mark, their use of the word 'Veribest' for their trade-mark does not infringe it. I think it clear that no dealer can be prevented from asserting, by an advertisement printed on the goods, or in any other manner, that his goods are the best, or the best yet, or the very best. If the word 'best' is included in a queer compound word oddly spelled, used as a trade-mark, that does not prevent other dealers from using the same word in the same way, so long as the word first created is not imitated too closely."

The court points out that if an application had been made to trade-mark the words "'Best Yet', the statement would be simply descriptive, and the usual commendation of a vendor, and could not be a valid trade-mark." The court lays emphasis on the fact that "the impression produced on the sight of the buyer is the main thing," and that the term "Bestyette" was sufficiently "compounded and fantastically" spelled to make it distinctive as a trade-mark.

In the case at hand, we are of the opinion that the word "best" is not "included in a queer compound word oddly spelled" so as to make it a distinctive trade-mark, nor is there such an impression produced on the sight of the buyer. The words "best" and "made" are correctly spelled and the fact that they are joined together does not make it sufficiently distinctive as eligible for a valid trade-mark.

It must be pointed out in the Flam case, supra, that there was evidence showing that the term "Bestyette" had been used exclusively by the complainant for more than ten years before the Trade-Mark Act of 1905, and hence under Section 5 of that Act "the fact that the term was originally descriptive does not prevent registration."

63 C. J., page 351, declares the reason for prohibiting descriptive terms as trade-marks in the following language:

> "Reason for prohibiting descriptive terms as trade-marks is that everyone should have the right to truly describe his goods and business and should be able to use the terms necessary or appropriate for that purpose."

The Supreme Court of Missouri in the case of Nicholson v. Wm. A. Stickney Cigar Co., 59 S. W. 121, l. c. 122, made the following observation with respect to the use of a word as a trade-mark for the simple purpose of describing the quality of the goods:

> "In Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co., 104 Mo. loc. cit. 60, 15 S. W. 844, Black, J., said: 'The general principles of the law concerning trade-marks are well settled. A person has a right to the exclusive use of marks, forms, or symbols appropriated by him for the purpose of

> pointing out the true origin or ownership of the article manufactured by him. The limitation upon this right is that such designs or words may not be used for the simple purpose of naming or describing the quality of the goods; for to permit that would be to foster a monopoly, while the great purpose of the law of trade-marks is to protect the owner in the exclusive use of his device which distinguishes his product from other similar articles, and to protect the public against fraud and deception."

To permit the term "BESTMADE" to be registered would not only be fostering a monopoly for applicant's malt, but, as stated by the court in Iowa Auto Market v. Auto Market & Exchange, 197 N. W. 321, l. c. 323, citing many cases,

> "It has been frequently said that no one can secure a monopoly upon the adjectives of the language."

The fact that the word "BESTMADE" has been registered in the United States Patent Office is not conclusive proof to this state, nor does it amount to an adjudication of the fact that the term is not descriptive. The courts have held from an early date that the rights and remedies concerning trade-marks generally depend upon the laws of the state, and in the case of Luyties, et al. v. Hollender, et al., 21 Fed. 281, we find the following language:

> "Rights and remedies pertaining to trade-marks generally depend upon the laws of the state, common and statutory, and not upon the laws of the United States. Trade-mark Cases, 100 U. S. 82."

In view of the foregoing, we are of the opinion that the word "BESTMADE" is not sufficiently distinctive to make it eligible for a valid trade-mark under the laws of the State of Missouri.

II.

63 C. J., page 346, declares the following rule in determining whether a descriptive term is subject to being trade-marked:

> "Thus no word or combination of words can be exclusively appropriated if it * * * merely indicates * * * the process of manufacture or method of production."

In the case of Sun-Maid Raisin Growers v. Mosesian, 258 Pac. 632, the court said:

> "It is true that the use of terms, which are merely descriptive of the manner or process by which, or the ingredients with which, an article is made, is not subject to registration and will not be protected against infringement, particularly where the process is open to the use of the general public. L. R. A. 1916E, 633. * * *
>
> "It is also true that language which is merely descriptive of the process of manufacturing is not susceptible of exclusive appropriation. L. R. A. 1916E, 633. This rule has been applied to the following language: Hot forged hammer point nails; shredded whole wheat; Oriental Rug Renovating Company; lamb-knit; compressed yeast; flaked oatmeal; prime leaf lard."

Our court adopted the same rule in the case of McGrew Coal Co. v. Menefee, 162 Mo. App. 209, 144 S. W. 868, l. c. 871, wherein it said:

> "Bituminous coal is a commodity of general use in this state. It is as much a staple article of consumption as sugar and coffee. It is a matter of common knowledge that the ordinary consumer prefers to buy the coal that comes in the largest lumps and is most free of slack and dust. The word

> 'lump,' therefore, refers to quality and certainly no dealer should be allowed the exclusive use of that word. The word 'Electric' has a general, well-understood meaning, i. e., that the coal was mined by electric machines and, therefore, is cleaner and in larger lumps than coal mined in the old way. Used as an adjective to the noun lump the term thus formed is descriptive of quality only. The claim of plaintiff that it has an exclusive right to the use of that term in practical effect is the assertion of a right to monopolize the sale of coal mined by the new and now general method since the enjoyment of the exclusive right to advertise coal of such quality would amount to a monopoly of the sale of such coal.
>
> "Thus it appears that plaintiff is founding its cause of action, not upon its own skill, genius and industry, but upon its voluntary appropriation of a term that in all equity and good conscience should be regarded as common property which any dealer in coal mined by electricity may use in advertising his business. Plaintiff acquired no property right in the name 'Electric Lump' and the learned trial judge took a proper view of the case in dismissing the bill."

To permit the term "handmadelong filler" to be trademarked would give the applicant exclusive right to monopolize the sale and advertisement of cigars by an old and established method of production. We are of the opinion that the mere fact that three commonly used and correctly spelled words in the tobacco trade, hand-made-long, are joined together is not sufficient to take it out of the rule which declares that a combination of words which merely indicates the process of manufacture or method of production is not the subject of a valid trade-mark.

III.

Webster's New International Dictionary defines the term "panetela' thus:

> "(Sp.) A long, thin cigar, cylindrical in shape, except for the finished mouth end."

The question arises whether a Spanish or foreign descriptive word may be trade-marked.

63 C. J., page 361, states that

> " * * * a foreign descriptive word or phrase * * * is not a good trade-mark."

In the case of In re Bradford Dyeing Association, 46 Appeal Cases, Dist. of Columbia, page 512, the court adopted the above rule and said:

> "This appeal (by the Bradford Dyeing Association) is from the refusal of the Commissioner of Patents to register the word 'E'clatant' as a trade-mark for cotton piece goods.
>
> "A sample of the goods with the appellant's mark thereon is included in the record. The goods have a satin finish, and are described as 'Satin E'clatant.' The word sought to be registered is a French word meaning brilliant, shining, glittering, etc. Registration was denied on the ground that the mark is descriptive of the character and quality of the goods.
>
> "Descriptive words and phrases in a foreign language are not registerable. Re Hercules Powder Co. ante, 52; 38 Cyc. 731. The reason for bringing descriptive foreign words and phrases within the limitations of the statute is apparent. Not only would the meaning soon become known to the public, but the user of the mark would appreciate the advantage of disseminating such information by advertisement or otherwise. Indeed, there would be nothing to prevent the printing of a translation of

> the word or phrase in direct connection with the use of the mark. The policy which dictates this inhibition is not affected by Rossman v. Garnier, 128 C. C. A. 73, 211 Fed. 401, chiefly relied upon by counsel for appellant. That was an infringement suit in which a mark consisted of a French word. The court expressly found that it had been registered under the ten-year clause of the Trademark Act of 1905, and that it was, therefore, unnecessary to pass upon the question of whether or not it was descriptive of the quality or character of the goods upon which it was used."

The Spanish word "panetela" is well known to the cigar-smoking public as indicating a cigar of a particular shape, and, being a descriptive term, we are of the opinion that the fact that an extra letter is added to the word does not make it so distinctive as, when taken together with the term "cigar", will make it the subject of a valid trade-mark.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

MW:HR

ROADS & BRIDGES: Mayor of City of Fourth Class has a right to cast a vote for special road commissioner.

2-19

February 19, 1936.

FILED
12

Mr. Percy M. Brown
Circuit Clerk
Saline County
Marshall, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "Will you please send this office a written opinion as to whether or not a Mayor of a Fourth Class City has the right to cast a vote for a Road Commissioner only in case of a tie?"

We assume that the Commissioner to be appointed is by virtue of the provisions of Section 8026, R. S. Mo. 1929, which relates to commissioners of special road districts.

The Supreme Court of Missouri in State ex inf. v. Meyer, 12 S. W. (2d) 489, had before it for determination the precise question inquired of by you. In its opinion, the court said the following were the facts:

> "By authority of Section 10802, R. S. 1919 (Sec. 8026, R. S. 1929), and on February 17, 1927, the mayor and members of the council of Mt. Vernon met with themembers of the county court of Lawrence County in the county court room in Mt. Vernon to appoint a road commissioner for the Mt. Vernon Special Road District. Mt. Vernon is a city of the fourth class, with a mayor and eight councilmen, and is the county seat of Lawrence County.

> At the meeting, the members of the county court, the mayor, and seven councilmen were present. On a vote being taken, respondent Charles Meyer received six votes and relator William Jones received four votes. The presiding judge did not vote, and one of the councilmen was absent."

As to the questions presented before the court for determination in the above case, the court said:

> "Respondent, Meyer, contends that under Section 10802, R. S. 1919, the mayor and councilmen are each entitled to cast a vote for commissioner.
>
> "Relator, Jones, contends the mayor and councilmen sit as one member of the county court and together have only one vote, and that, two members of the county court having voted for him, he thereby received a majority of the legal votes cast."

The court, in disposing of the contentions of the parties, said the following:

> "It will be noted, that, on the assembling of the mayor, the members of the council, and members of the county court, the meeting is declared organized, with the presiding judge as the presiding officer and the county clerk as clerk of the meeting. They do not meet as officers of the city or as officers of the county. They meet as one body, for the sole purpose of appointing the commissioners.

* * * * * *

"Cities of the fourth class may be divided into not less than two wards, with two councilmen from each ward, and cities under commission form of government may have two or more councilmen. From this relator argues that, if the mayor and each member of the council is entitled to one vote, it would give a city having a greater number of councilmen an advantage in the appointment of the commissioners.

"Relator assumes the mayor and councilmen act as officers of the city in appointing commissioners. As stated, the mayor and members of the council and members of the county court do not participate in the meeting as officers of either the city or county, but as representatives of the whole district for the sole purpose of appointing commissioners.

"The statute no more limits the mayor and members of the council to one vote than it limits the members of the county court to one vote. * * *

REAL ESTATE: Authority of State to sell real estate.

3-20

March 12, 1936.

FILED
12

Mr. John H. Bruner,
Chief of Police,
Jefferson City, Mo.

Dear Sir:

We regret that we have taken so long to acknowledge receipt of your request for an official opinion under date of February 7, 1936, as to the proper procedure to pursue to enable the City of Jefferson City, Missouri to obtain a grant or conveyance of State Park, located in Jefferson City, from the State of Missouri.

Upon a careful investigation, we find that State Park, located in Jefferson City, Missouri, better known as "McClung Park", was purchased in the early part of the year 1883 in the name of the Missouri State Penitentiary. The tract consisted of ten acres and was known as the "Wagner Rock Quarry."

59 Corpus Juris, Sec. 276, p. 164, in discussing the rights and powers of a state in respect to its property, says:

> "A state has in general the same rights and powers in respect of property as an individual. It may acquire property, real or personal, by conveyance, will or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit. The power of the state in respect of its property rights is vested in the legislature, and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose;

> and, where the state has not given its consent to the acquisition of property in a particular way, it is not entitled thus to acquire it. The legislature may, however, ratify the unauthorized act of a state officer in dealing with its property. The possession of state property by the authorized agents and officers of the state is the possession of the state."

And in 59 Corpus Juris, Sec. 280, p. 166, we find the following statement with reference to sales and conveyances by the state of its property:

> "State property cannot be sold or disposed of except by authority of law, but, subject to constitutional restrictions, the state, like any individual owner of property, may convey its property in any way it sees fit, and its grant may be express or by necessary implication. The power to dispose of state property is vested in the legislature."

Section 8339, R.S. Mo. 1929 authorizes the State Prison Board to purchase and lease lands, thus:

> "Said Board shall, with the approval of the governor, have authority to lease or purchase such lands, suitable for farming, rock quarries or grazing purposes, or for any or all of said purposes, as deemed by said board necessary and proper for said purposes, and to be used by said board for the employment at useful work of the prisoners at said penitentiary, and for training the same that they may on leaving the penitentiary be of good health and character and competent to earn an honest livelihood; on which lands, when purchased as herein provided, said board is authorized to erect such buildings for hospitals, dormitories, reformatories and other structures or improvements as the board may, with the approval of the governor, deem necessary and proper

> for the welfare of the prisoners. Such purchase of said lands by said board shall be on behalf of the State of Missouri at such terms as said board may deem fair and reasonable and a deed taken therefor to the State of Missouri; and if said board is unable to purchase such lands by them selected for the purposes aforesaid at a fair and reasonable price, they are hereby empowered and authorized to direct the Attorney General, and the Attorney General is hereby required when so directed, to institute in the name of the State of Missouri proceedings for the condemnation and taking of such lands selected by the said board, and said condemnation proceedings shall be in all things governed and controlled by the laws of this state governing the condemnation of private property for a public use by railroad companies and all the laws and statutes of the state applicable to the condemnation of private property for railroad purposes shall be the law for determining the rights of property of each party to any such proceedings."

The above section discloses that although the Prison Board has the authority, with the approval of the Governor, to purchase and lease lands, yet they are given no express authority to dispose of same. The land thus purchased is state property and the Board takes title to the land merely as an agency of the State for State purposes, as stated by the Court in the case of Milwaukee v. McGregor, 121 N.W. (Wis.) 642:

> "The fact that the board is made a state agency to take and hold title to property for state purposes does not cut any figure in the matter. The building is not designed to be, in any proper sense, the property of the board, except as representing the State."

From the foregoing, it is evident that it would not avail the City of Jefferson City to enter into negotiations with the State Prison Board, but the former must look to the Legislature if it is to obtain the land at all.

Having determined that the power to dispose of State Park is vested in the Legislature, the question arises - May the latter offer same to Jefferson City by grant? We have seen that a state may dispose of its property in any manner it sees fit, subject to constitutional restrictions, and an examination of Section 46 of Article IV of the Missouri Constitution discloses the following prohibition:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, that this shall not be so construed as to prevent the grant of aid in a case of public calamity."

That the granting of State Park to the City of Jefferson City, Missouri would be a grant of a thing of value to a municipal corporation is clearly evident, and therefore we are of the opinion that the General Assembly would have no power to grant State Park to the City of Jefferson City, Missouri.

We are unable to find any constitutional restriction which would prohibit the State from disposing of State Park for a valuable consideration, and hence, we are of the opinion that the procedure to be pursued would be for the City of Jefferson City to ask that the next General Assembly authorize a conveyance of State Park to the City of Jefferson City, Missouri, for a valuable consideration.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

TRADE-MARKS: Resemblance between two trade names as to raise a probability of public mistaking one for the other may not be registered.

April 16, 1936. 4-20

FILED
12

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your request for an opinion under date of April 11, 1936, as follows:

> "We have an application from Clifford Farmer of Springfield, Mo., to register his milk receptacles under Section 12449, the name being Rolling Acres.
>
> "Under date of Feb. 9, 1933 we registered Rolling Acre Dairy for Miss Edith Harsh of St. Louis.
>
> "Please advise if this registration would prevent Mr. Farmer from registering his trade name."

We respectfully direct your attention to an opinion rendered you under date of June 2, 1933, wherein a similar question was raised and wherein we stated as follows:

> "But if it be contended and conceded the 'Names' of each company are not ineligible for registration under Section 12449, R. S. of Mo. 1929, because the words used are geographical and descriptive only; still for another legal reason, the 'South St. Louis Dairy Company' is not entitled to registration under said Section 12449. It is true the South St. Louis Dairy

Company has some words and features, in its name, brand and device, not found in the name and brand and device of the St. Louis Dairy Company but that alone is not sufficient to render the name and brand eligible to registration under existing conditions.

"The rule of law is, if the resemblance between the two trade names is sufficiently close to raise the probability the public might mistake one company's product for the other, in such event the latter applicant for registration is not entitled to register his or its trade name, mark or device as the case may be. The name 'St. Louis Dairy Company' and 'South St. Louis Dairy Company' and the wording on the bottles of the two companies and so far as we can see by the drawings, the shape and size of the bottles of the two companies are so similar and the resemblance between the two trade names and the bottles and the words thereon is sufficiently close in the opinion of this Department to raise a probability of the public mistaking one company's product for that of the other and therefore it is our opinion, as the St. Louis Dairy Company was registered in October, 1932, and received a certificate of registration from the Secretary of State, that the South St. Louis Dairy Company can not now legally register bottles and the words thereon under Section 12449.

Sanders v. Utt, 16 M. A. 322;
Sanders v. Jacobs, 20 M. A. l.c. 98;
McCartney v. Garnhart, 45 Mo. 592;
Gamble v. Stevenson, 10 M. A. 581."

The resemblance between the two trade names "Rolling Acres" and "Rolling Acre Dairy" are sufficiently close to raise a probability of the public mistaking one company's product for that of the other, and therefore it is our opinion, as

Miss Harsh of St. Louis registered the trade name of "Rolling Acre Dairy" on February 9, 1933, and received a certificate of registration from the Secretary of State, that Mr. Farmer can not now legally register his trade name "Rolling Acres".

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

TRADE MARKS: Words in common use can not be trade-marked.

April 22, 1936.

4-27

FILED
12

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your request for an opinion under date of April 18, 1936, as follows:

> "Will you please note attached application to register trade-mark 'Cod Liver Oil Fortified with Percomorph Liver Oil' by Mead Johnson & Company, Evansville, Indiana, and correspondence relating thereto, and advise us whether in your opinion, this name is subject to registration under the trade-mark law."

In the case of Trask Fish Co. v. Wooster, 28 Mo. App. 408, l. c. 419, the court in holding that ordinary English words in common use can not be exclusively appropriated as a trade-mark by one dealing in such articles, said:

> "A trademark, to create a proprietary right, must be, not a word or phrase which has become the common property of all mankind in their use of language to identify the thing intended, but must be a name or symbol arbitrarily chosen by the proprietor to distinguish his particular product or commodity from those of all other producers or dealers. By these means only can the commodity be exclusively associated, in the minds of the public, with the proprietor of the trademark."

See, also McGrew Coal Co. v. Menefee, 162 Mo. App. 209, l. c. 216.

In the case of Schmidt v. Brieg, 22 L. R. A. 790, the California Supreme Court (In Banc) in holding that the words "Sarsaparilla and Iron" could not be claimed as a trade-mark, said:

> "Words in common use are the common property of the people, and no one can acquire an exclusive right to such words by adopting them as his trademark, unless they be used out of their ordinary acceptation, and as a fancy name. The general rule is opposed to the use of mere words as a trade-mark; but if all of the words be used under a new combination in the way of a fancy name or designation, they may constitute a valid trade-mark, if they do in fact indicate origin or ownership. Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 546, 34 L. ed. 1003. We think the words 'Sarsaparilla and Iron' are generic terms, and were used for the purpose of indicating, not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself."

And in the case of Alff & Co. v. Radam, 77 Tex. 530, l. c. 540, 541, the court said:

> "Words in common use are common property of the people, and no exclusive right to the use of such words can be acquired by adopting them as a trade mark, unless they be used in an arbitrary or fanciful sense and not in their ordinary signification. Browne on Trade Marks, sec. 161; Filley v. Fassett, 100 Am. Dec., 279.
>
> "On the trial the plaintiff testified that the words 'Microbe Killer' mean 'fungus' destroyer; that the word microbe was intended to signify fungus; that in using the name 'Microbe Killer' he intended to convey the meaning that it kills those things, and that the name 'Microbe Killer' means destroyer of microbes.
>
> "That the words are English words in common use, of known signification and fixed meaning, we think there can be no doubt, and that they were employed by the plaintiff in their

> ordinary and not in any arbitrary or fanciful sense is shown beyond question by the testimony of the plaintiff himself. Under the authorities, supra, we think it quite clear that the words 'Microbe Killer' as used by the plaintiff did not constitute a trade mark."

An examination of the above authorities indicates that we must first determine whether the words sought to be trade-marked are in common use, and we know of no better test than to examine a good English dictionary.

Webster's New International Dictionary defines the term "cod" thus:

> "A soft-finned fish (Gadus callarias) of the colder parts of the North Atlantic, one of the most important food fishes of the world."

"Percomorphi" is defined therein as:

> "An extensive suborder or order of fishes comprising the perches, basses, and mackerels and their allies, thus including a majority of the spiny-finned fishes."

"Fortify" is defined therein as:

> "To make strong; to strengthen * * *."

The product sought to be trade-marked and obtain exclusive use therefor advises the hearer or reader that the composition of the product is oil from the liver of a cod, strengthened from oil from the livers of perches, basses, and mackerels and their allies.

The words are English words in common use, of known signification and fixed meaning, and they are, beyond question, employed in their ordinary and not in any arbitrary or fanciful sense.

The court in the case of Caswell v. Davis, 58 N. Y. 233, l. c.234, said:

> "It is the result of all the decisions, that known words and phrases indicative of quality and composition are the common property of all mankind. They may not be appropriated by one to mark an article of his manufacture, when they may be used

truthfully by another to inform the public of the ingredients which make up an article made by him. Even when the sole purpose of the one who first uses them is to form of them a trade mark for himself, expressive only of origin with himself, if they do in fact show forth the quality and composition of the article sold by him, he may not be protected in the exclusive use of them. Still less, then, when joined to the fact that they do thus show forth the quality and composition, there is a purpose that they should do so. It is a right which every one has, and from the exercise of which he may not be debarred, to make an article of the same ingredients, of the same composition and of as good quality as that made by another, when that other has no exclusive privilege of manufacture conferred by law. Having this right to make, he has also the right to indicate the ingredients, the composition and quality of that which he has made, by any usual words or phrases apt therefor. Hence, when he adopts usual phrases which do no more than this, he but takes from a stock common to all mankind, and does not infringe upon any exclusive right of another, who has, before that, used the same or like words or phrases. Nor can the first user avoid this result, by coupling with his purpose to indicate quality and characteristics, a purpose also to indicate origin. Though he have that purpose also, and the form of words used by him have also that effect, inasmuch as he cannot be given the exclusive use, without impairing the right of another, the exclusive use will be denied. The general rule is against appropriating mere words as a trade mark. * * *

" * * * Nor is the question, whether the name used as a trade mark will convey an exact notion of how to compound an article, so that one reading it may be able to make a like article. If the necessary effect is to inform the reader or hearer of the general characteristics and composition of the thing, it is a name which may be used, with equal truth, by any one who has made and offers for sale a thing compounded of the same ingredients, and who desires to express to the public the same facts. Nor does the coupling

> together, in a new combination, of words which before that had been used apart, and had entered into the common or scientific vocabulary, give a right to the exclusive use of such combination, where it is indicative not of origin, maker, use and ownership alone, but also of quality and other characteristics. As it does appear from the testimony in this case, that the phrase claimed by the plaintiff is formed of words in use before the adoption thereof by them; that they were then and are now indicative, not of origin, use and ownership alone, but also of characteristics, quality and composition, the plaintiffs may not be protected in the exclusive use of it as a trade mark."

To permit the words "Cod Liver Oil Fortified with Percomorph Liver Oil" to be trade-marked would deprive persons offering for sale a thing compounded of the same ingredients and expressing the same facts to the public. We are, therefore, of the opinion that the words quoted may not be protected in the exclusive use of it as a trade-mark.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

BONDS:)
SECRETARY OF STATE:) Form of Dealer's Bond; approved.
BLUE SKY LAW:)

April 29, 1936.

4-30

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge receipt of your letter of April 15, 1936, in which you request the opinion of this Department relative to form of bond required by Section 7744, R. S. Mo. 1929. Your letter is as follows:

> "About two years ago, you advised me with reference to the aggregate clause in surety bonds required of dealers in securities, by the provisions of Sec. 7744 R. S. 1929.
>
> "The underwriters are again insisting upon a change in the bond. They state that the wording 'and shall properly account for all moneys or securities received from or belonging to another' be eliminated. They claim that Sec. 7744 specifies the condition of the bond, and that Judge Stockard was not justified in inserting the above wording in the bond form.
>
> "Unless this wording is eliminated, the underwriters will refuse to renew about three fourths of the existing blue sky bonds at the end of the current year. They claim that the present wording virtually causes the surety company to make an investment of $5,000 in the business of the principal.

> "The underwriters also want to insert a 60-days cancellation clause, to which I see no objection.
>
> "A copy of our standard form of bond is attached, bearing the corrections which have been requested. Will you please advise whether you approve the form as corrected, and favor me with any comment or suggestions you may care to offer?"

With your letter of request you have enclosed a printed form of dealer's bond in which certain portions thereof have been stricken out and typewritten additions made thereto. Your question, therefore, is whether or not the printed bond, Form J12, submitted to us, known as Dealer's Bond, as corrected and interlined complies with the bond required by Section 7744, R. S. Mo. 1929. Said section, as to the condition of the bond, provides, "* * * such bond to be conditioned upon the faithful compliance with the provisions of this chapter by said dealer and by all salesmen registered by him while acting for him." The condition of the bond is fixed by the Legislature and is a statutory bond, and, therefore, any other condition than that required by the statute would be unnecessary and surplusage.

In 9 Corpus Juris, page 26, it is said:

> "Where a bond contains the conditions prescribed by statute, and also contains conditions in excess of those so required, if the excess can be separated from the authorized portion without destroying the latter it may be rejected as surplusage and the rest of the bond held valid, in the absence of a statutory provision expressly or by implication making it void, unless the language of the bond precludes a construction giving it validity."

In Fogarty v. Davis, 264 S. W. 878, l. c. 880, the court said:

> "The rule in this state is that, in construing a statutory bond, the provisions of the

> statutes must be read into it and construed as a part of it. 'When parties execute a statutory bond they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions. * * * These provisions are a part of the bond of which both principal and surety must take notice.' State ex rel. v. Rubber Mfg. Co., 149 Mo. loc. cit. 212, 50 S. W. 330."

And further, it is stated in the case of Home Indemnity Co., v. State of Missouri, 78 F. (2d) 391, l. c. 393, as follows:

> "The scope of the surety's obligation under such a statutory bond is prescribed by the statute in compliance with which it is given and by the language employed in the bond defining it. Zellars v. National Surety Co., 210 Mo. 86, 108 S. W. 548; Fogarty v. Davis, 305 Mo. 288, 264 S. W. 879."

It is our opinion that a bond in the language of the statute would be sufficient and meet all of the requirements of the law, and that portion, namely, "and shall properly account for all moneys or securities received from or belonging to another" may be stricken from the printed form of the bond submitted.

Limits of Liability.

The bond contains this provision:

> "The limit of liability of the principal and surety herein shall not in any event nor in any circumstance exceed in the aggregate the sum of Five Thousand ($5000.00) Dollars.";

and is not ambiguous and expressly limits the penal sum of the bond to $5000.00, and the typewritten clause, namely, "and that the aggregate liability under this bond and all the renewals thereof shall at all times be limited to the penal sum above stated, and that liability shall not be cumulative.", is unnecessary and does not add anything to the bond.

We can see no serious objection to that part of the typewritten portion of the bond, relative to the concellation clause, as follows:

> "This bond is subject to the further condition that the surety may terminate its liability thereunder, as to all transactions subject to such termination, by written notice of cancellation to the Commissioner of Securities of the State of Missouri, such termination to be effective on a date not less than sixty (60) days from the receipt of such notice by the Commissioner of Securities."

A bond written in accordance with the above suggestions will be approved as to form by this Department.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

CHH:EG

MOTOR VEHICLES: Safety glass required (1) when car is used for carrying passengers for hire; (2) when car is sold in the State of Missouri and designed for carrying passengers.

May 20, 1936.

5-21

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge your letter enclosing correspondence you had with Percy W. Gullic, Alton, Missouri, relative to your refusal to register his motor vehicle because it is not fully equipped with safety glass.

Laws of Missouri, 1935, pages 295 to 297, relates to the necessity of motor vehicles to be equipped with safety glass. Said act falls into two classifications: (1) Motor vehicles operated upon the highways which are "designed or used for the purpose of carrying passengers for hire, or designed or used for the purpose of carrying school children." Section 1. And (2) sale of motor vehicles in Missouri "designed for the purpose of carrying passengers." Section 2.

It is to be noted under Section 1, supra, that the statute makes it unlawful after January 1, 1936, to operate on the public highways a motor vehicles manufactured or assembled after said date, designed or used for the purpose of carrying passengers for hire or used as a school bus. Section 1 does not relate to a passenger car used by an individual for pleasure. A motor vehicle may be designed and used for transporting passengers, yet, the transporting of said passengers must be for hire and if the motor vehicle is not used for the transporting of passengers for hire, Section 1 of the act does not apply.

Section 2 of the act relates to the sale of motor vehicles designed for the purpose of carrying passengers, and provides as follows:

> "It shall be unlawful after January first, nineteen hundred and thirty-six, to sell in the State of Missouri, any motor vehicle, manufactured or assembled after said date, and designed for the purpose of carrying passengers, unless such vehicle be equipped in all doors, windows, rear windows and windshields with safety glass."

You will note from a reading of the above section that the unlawful act consists in the selling in the State of Missouri a motor vehicle designed for the purpose of carrying passengers unless such vehicle be equipped with safety glass. In other words, to violate Section 2 the sale must be made in the State of Missouri. A motor vehicle purchased in another state and operated in this State would not have to be equipped with safety glass if such vehicle was not operated or used for the purpose of carrying passengers for hire. To illustrate: If a person goes to a neighboring state and purchases an automobile and used and operates such in Missouri for the transporting of himself and members of his family or friends, and not for hire, but for pleasure or accomodation, said vehicle would not have to be equipped with safety glass as the sale was not made in the State of Missouri. Section 2 prohibits the sale of motor vehicles designed for carrying of passengers, unless equipped with safety glass, but does not prohibit the operating of motor vehicles designed for carrying passengers. However, if the vehicle is used for the carrying of passengers <u>for hire</u>, then Section 1 would be violated, unless equipped with safety glass.

The facts presented by Mr. Gullic show that he purchased his automobile in the State of Arkansas and that it will not be used for the purpose of hauling passengers for hire. Consequently, Mr. Gullic's automobile would not have to be equipped with safety glass and your Department could not require it to be so equipped or refuse to register and license said vehicle, in our opinion. However, we believe that your Department could require Mr. Gullic to make an affidavit to the effect

that the purchase of his automobile was by virtue of a sale made in the State of Arkansas.

We refer you to our opinion to you, dated October 26, 1935, which also treats of the subject herein discussed. We are returning herewith your file.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JLH:EG
Enc.

SECURITIES DEPARTMENT: Acreage and drilling agreement of H.F. Wilcox is within the exemption of sub-section (f) of Sec. 7726, R.S. 1929.

May 26, 1936. 5/29

FILED
12

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Mo.

Attention: Corporation Department

Dear Sir:

This department is in receipt of your letter of May 21 requesting an opinion as to the following:

> "I enclose herewith copy of recently proposed agreement to be issued and guaranteed by the H.F. Wilcox Oil and Gas Company of Tulsa, Oklahoma, a corporation engaged in the oil business whose common stock is listed on the New York Stock Exchange and approved exchange in the Securities Department.
>
> "I will appreciate your opinion as to whether or not this instrument constitutes such an evidence of indebtedness as to be exempt under Paragraph F of Section 4 of the Missouri Securities Act."

Section 7726, R.S. Mo. 1929, as amended Laws of Missouri, 1931, page 352, and Laws of Missouri, 1935, page 360, relating to securities exempt from the provisions of the law relating to the Securities Department of the State, in sub-section (f) provides:

> "Securities which at the time of the sale thereof are issued and fully listed upon duly organized stock exchanges to be approved by the commissioner, and securities

> senior to any security so listed or represented by subscription rights which have been so listed upon any of such exchanges, and evidences of indebtedness guaranteed by any company the capital stock of which is so listed upon any of such exchanges."

We have examined the proposed Acreage and Drilling Agreement submitted to us and if the agreement be exempted by reason of subsection (f), supra, it must be by reason of its being an evidence of indebtedness. The agreement has been guaranteed by the H.F. Wilcox Oil and Gas Company, a Delaware Corporation, the common stock of which is listed upon the New York Stock Exchange.

The word "indebtedness" has been defined in 31 Corpus Juris, page 411, as follows:

> "In statutes it should be liberally construed in accordance with the legislative intent. * * * The term 'indebtedness' has at times a signification far broader than the law dictionaries assign to it, a more general and common meaning, being often used in its large and general sense, and not in its technical one, not even involving of necessity the idea of money obligation. In its more general sense it is defined to be that which is due from one person to another, that which one person is bound to pay or perform to another. In this sense, it may include every obligation by which one person is bound to pay money, goods or services to another. * * *"

In the case of Matter of Robert, 4 Dem. Surr. (New York) 185, l.c. 198, the Court said:

> "The word 'indebtedness' is not exclusively a term of legal technicality. It has at times a signification far broader than the law dictionaries assign to it, not even involving of necessity the idea of money obligation."

In the instrument here under consideration, there is no question but that H.F. Wilcox guarantees to perform a distinct service and is "indebted" by reason of this agreement to carry out said obligation. The H.F. Wilcox Oil and Gas Company guarantees the performance of this agreement in a guaranty that reads as follows: "This well will be commenced on or before December 31, 1936, and the performance of the within contract by H.F. Wilcox is hereby guaranteed by H.F. Wilcox Oil and Gas Company, a Delaware Corporation."

Webster's New International Dictionary defines a "debt" to be:

> "That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or perform for his benefit."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the Acreage and Drilling Agreement submitted is within the exemption of sub-section (f) of Sec. 7726, R.S. Mo. 1929 as amended, in that said agreement on the part of H.F. Wilcox is within the meaning of the term "evidence of indebtedness" as used in said section, and is guaranteed by a corporation, the common capital stock of which is listed upon a duly recognized stock exchange.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

JWH:AH

APPROVED:

ROY McKITTRICK,
Attorney General.

SHERIFF: Expenses necessary in execution of deatl warrant are a charge on the sheriff.

- -

July 10, 1936.

FILED
12

7-10

Mr.Birt P. Bryant
Circuit Clerk
Dunklin County
Kennett, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion dated July 4, 1936, which reads as follows:

> "Section 11791 Revised Statutes of Missouri 1929, among other things sets out the following item:
>
> > " 'For executing every death warrant, to include all necessary expenditures in performing same $125.00.'
>
> "In view of the above is the Sheriff required to pay out of the above sum for the erection of the scaffold, Rope, etc."

We find the quotation of your request to be a true copy of the words in the Statutes. This fee provision in the Statutes has never been construed by our Courts.

Section 655, R. S. Mo. 1929, provides in part:

> "The construction of all statutes of this state shall be the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * *"

CONCLUSION.

The context of the Statutes allowing $125.00 to the sheriff for executing every death warrant to include necessary expenditures in performing same clearly expresses the Legislative intent. The words and phrases have no technical meaning, hence we must take them in their plain, ordinary and usual sense. The phrase "to include all necessary expenditures" shows that the Legislature anticipated the sheriff to expend money for the necessary rope and scaffold.

This department is of the opinion that the sheriff is required to pay from his $125.00 fee all necessary expenditures in executing a death warrant.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

ELECTIONS: 1. All of the judges at election should select the clerks of election.

2. Judges may not select clerk related to them within fourth degree of consanguinity or affinity.

July 25, 1936

7-31

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Mr. Brown:

This will acknowledge receipt of your letter of recent date requesting an opinion of this office upon the following matter:

> "I have a complaint which compels me to call upon you for an opinion as to who may appoint clerks of elections. Section 10211, Revised Statutes of Missouri 1929, says the judges shall appoint two clerks.
>
> The complaint is from judges who have been appointed for the coming Primary in which they state that one of the judges, when called to meet to select clerks, said that she had appointed her daughter clerk.
>
> The opinion I want is whether or not one judge may select a clerk or should the majority of the judges appointed select a clerk or clerks. The second question I would be glad for you to advise whether or not an election judge or judges can appoint a son, or daughter, or kinsman, to act as clerk.
>
> Your early reply will be appreciated."

I.

Section 10211 R. S. Missouri 1929 about which you inquired has been repealed and Section 10211 Laws of Missouri 1933, page 239 has been enacted in lieu thereof. Said section reads as follows:

> "In all precincts casting less than three hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting three hundred or more votes in the last preceding general election, the judges shall appoint four clerks. The clerks, before entering on the duties of their appointment, shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, that they will faithfully record the names of all the voters; said clerks shall also take the oath above prescribed for judges to be administered at the same time and in the same manner heretofore directed."

It is a fundamental principle of statutory construction, too well known to require any citation of authority, that where a statute is plain and unambiguous there is no room or necessity for construction. The above section is plain and unambiguous and provides that the judges shall appoint the required number of clerks. It is a matter of general practice for Democratic Judges to appoint half of the number of clerks and the Republican Judges to appoint the remaining number of clerks. It is also a matter of common practice for the judges to agree among themselves who shall act as ballot receiving and counting judges and for the receiving and counting judges to select their own clerks. This is however merely a matter of practice which is done by mutual consent of all the judges. The above statute however clearly makes it the duty of all the judges to appoint necessary clerks and not that the individual judges shall select their own clerk.

It is therefore the opinion of this Department that all of the judges of election should select the clerks and that an individual judge does not have the authority to appoint his own clerk without the consent of the other judges.

II.

We will now proceed to answer your second question as to whether or not an election judge or judges can appoint a son or daughter or other relative to act as clerk.

Section 13 of Article XIV of the Constitution of Missouri provides:

> "Any public officer or employe of this state or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Judges of election clearly have the right to appoint clerks of election. There can be no doubt that such clerks render service to the State, the only question involved is whether an election judge is a public officer within the meaning of the above section. In the case of State ex rel. vs. Maroney, 191 Mo.531, l. c. 546, the Court said:

> "It is a part of the functions of State government to provide elections for public officers, and to furnish suitable officers for putting in operation such provisions. We have in this cause the relators who have been duly appointed judges and clerks of election in their respective precincts, occupying positions created and conferred by law. Their right and authority to perform the duties incumbent upon them emanates from the legislative branch of the State government. The duration of their terms definitely fixed; their duties plainly marked out, which are of great public importance and clearly for the benefit of the public. The emoluments of the offices held by them, as well as certain privileges and immunities, such as exemption from jury service, are fully provided for; hence it is apparent that in the positions occupied by relators, there are embraced 'the ideas of tenure, duration, emolument and duties,' which are essential requisites in order to

constitute the position of judges and clerks of election 'an office,' within the well-understood meaning of that term."

In view of the above it is the opinion of this office that if a judge of election should participate in the appointment of a relative within the fourth degree, either by consanguinity or affinity, as a clerk of election, such appointment would be in violation of Section 13 of Article XIV of the Constitution of Missouri.

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

JET:MM

BOND INVESTMENT COMPANIES: Bond investment company must post one hundred thousand dollar bonds-- Companies held to be Bond Investment Companies.

July 28, 1936.

8-7

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Attention: Mr. Maloney,
Commissioner of Securities.

Dear Sir:

This is to acknowledge your letter inquiring if the Fortified Investment Company and The Franklin Society are within the provisions of Section 5060, R. S. Mo. 1929, or Section 4986, R. S. Mo. 1929, and if not are such within the scope of the Securities Act, Chapter 40, R. S. Mo. 1929?

The Franklin Society and the Fortified Investment Company purpose to issue certificates (which are similar) that provide that after the expiration of fifteen annual payments the person to whom the certificate is issued will receive a fixed sum of money. The certificate has attached to it, and a part thereof, certain privileges, terms and conditions.

The Fortified Investment Company has the following privileges and conditions, among others, attached to its certificate:

> "Security. In compliance with the statutes and regulations governing Investment Companies, the Company must maintain at all times an assigned deposit of securities consisting of first mortgages, or first deeds of trust on improved real estate, cash, government and municipal bonds, and/or other securities that qualify for investments of life insurance companies under the laws of

> the State of New York, in an amount equal to $110.00 for each $100.00 of its liability hereunder, less the amount of any loans made hereon."

The Franklin Society has the following:

> "Security. The Society agrees to maintain cash and securities as required by the laws of the State of Missouri aggregating in amount not less than 110 % of the Society's outstanding liabilities hereunder and under all contracts of same form said liability being the cash values shown in paragraph 7 (A) hereof less the amount of any loans made hereon."

Both the Fortified Investment Company and The Franklin Society provide in the privileges and conditions for "installment payments," advance payments," "cash value," cash loan," "payments after maturity," etc. In fact, both the Fortified Investment Company and The Franklin Society propose to issue certificates identical in nature and intent, the wording of the certificates being slightly different.

The sole question for our determination is whether or not said corporations when the proposed certificates are issued bring them within the provisions of Article 9, Chapter 32, R. S. Mo. 1929, relating to "Co-operative Companies," or within the provisions of Article 13, Chapter 32, relating to "Bond Investment Company," or within the provisions of Chapter 40, R. S. Mo. 1929, relating to Securities Department or "The Missouri Securities Act."

I.

CO-OPERATIVE COMPANIES.

Section 4986, R. S. Mo. 1929, provides in part as follows:

> "Any person -- corporation which is now engaged in or shall hereafter engage in issuing contracts or agreements, whether in the nature of a bond, debenture, certificate or otherwise, providing

> for the redemption, or the fulfilling of such contracts or agreements by the accumulation of a fund or funds from the contributions made by the subscribers to, or the holders of such contracts or agreements; or providing for the maturing or fulfilling of such contracts or agreements in the order of their issue or in some other fixed or arbitrarily determined order or manner; or providing for the payment of moneys or the granting or giving of any consideration, of any money or property, personal, real or mixed, greater in value, or represented to be greater in value, than the amount paid in upon such contracts or agreements, together with the actual net earnings accrued and accumulated thereon; * * * * except such * * corporations as are organized or doing business under the statutes now in existence or which hereafter may be enacted as excepted in section 4995 of this article, shall, and the same are required, for the protection of the subscribers to, or the holders of its contracts or agreements, to deposit with the state treasurer in cash, United States bonds, or bonds of any county, or municipal township, or such parts of each of the above mentioned securities so that the whole deposit shall be equal in cash value to the sum of twenty-five thousand dollars, and whenever the liability of such contracts or agreements, as hereinafter determined, shall exceed the amount of such deposit, there shall be made an additional deposit on the first days of January and July of each year, in a sum sufficient to cover the excess liabilities accrued during the last preceding six months; * * *"

Section 4995, referred to in Section 4986, supra, reads as follows:

> "Provided, that nothing in this article shall be construed to apply in any manner

> to any person, co-partnership, association, organization or corporation doing business under the provisions of the statutes for the regulation of banks, savings fund, trust companies, insurance companies, building and loan, bond investment, fiduciary, relief or fraternal orders, associations or companies."

Section 4991, R. S. Mo. 1929, places the supervision of said co-operative companies in the Bureau of Building and Loan Associations.

A reading of Article 8, referring to "co-operative companies," shows that the principle on which such companies operate is that of contributing to a common fund and members thereof participating in such with the restriction being that a deposit must be made by such companies with the state treasurer in a sum not less than twenty-five thousand dollars for the protection of subscribers. While Section 4991, supra, places the supervision of said companies with the Supervisor of Building and Loan Associations, however, the supervision is in the Commissioner of Finance by virtue of Section 5285, R. S. Mo. 1929.

It is our opinion that the partial payment investment certificates which the Fortified Investment Company and The Franklin Society propose to issue do not bring such corporations within the provisions of Article 9, Chapter 32, referring to "co-operative companies."

II.

BOND INVESTMENT COMPANIES.

Article 13, Chapter 32, R. S. Mo. 1929, relates to "Bond Investment Companies" and Section 5060 of said article provides in part as follows:

> "Every corporation doing business in this state as a bond investment company, or company to place and sell bonds, certificates or debentures on the partial payment or installment plan, shall and the same is hereby required to deposit with the state treasurer, in cash, United States or Missouri state bonds, or bonds of any county, municipal township or school bonds,

> or mortgage bonds secured by deeds of trust on unencumbered real estate * * *, or such parts of each of the above mentioned securities, so that the whole deposit will be equal to the sum of one hundred thousand dollars, * * * * * *."

Section 5064 of said article and chapter provides that the Supervisor of Building and Loan Associations shall have the power to examine into the affairs of such a company. However, by virtue of Section 5285, R. S. Mo. 1929, the power of examination now vests with the Commissioner of Finance.

You will note that Section 5060, supra, specifically provides that any company that places and sells bonds, certificates or debentures on the partial payment or installment plan, must post a deposit with the State Treasurer in the sum of one hundred thousand dollars. A bond investment company is not defined by statute. However, we adopt the definition given to it by Honorable Merrill E. Otis when Assistant Attorney-General, in an opinion to Honorable B. T. Hurwitz, Assistant Commissioner of Finance, dated November 16, 1922, wherein he said:

> "The purpose of the Legislature in the enactment of t e Bond Investment Act, as that purpose is declared by the Legislature, was 'the protection of the investors in such bonds,' that is, the bonds sold by such investment companies. Obviously, investors in high grade governmental or municipal bonds, such as are sold by the ordinary brokerage houses, are amply protected by the security of such bonds themselves. The companies aimed at, therefore, were those companies not dealing in the bonds of municipalities or public utilities but those companies dealing in their own bonds, which bonds carry with them no security other than the good faith and financial responsibility of the companies."

In Petters and Company v. Veigel, 209 N. W. 9, the Supreme Court of Minnesota, in dealing with a similar question

presented by your inquiry, made this observation concerning bond investment companies (1. c. 10):

> "Bonds issued by individuals are not often offered for sale to investors. Usually bonds are issued by private corporations and carry some sort of security. Loaning money is one of the purposes for which corporations of the class to which plaintiff belongs are organized. Ordinarily the loans are made on the security of real estate mortgages, which are pledged to a trustee before the corporation offers its bonds for sale. The bonds are issued in such denominations as will give small investors an opportunity to purchase them. Such investors rarely have the ability to make, or can go to the expense of making, a thorough investigation to ascertain whether the security behind the bonds is adequate. The banking department is in a favorable position to examine and appraise the security and to protect the interests of the public. These are some of the reasons why corporations organized for the purpose of issuing this class of securities may well be put in a class by themselves and made subject to the supervision of the banking department."

On March 21, 1927, Honorable H. O. Harrawood, Assistant Attorney-General, in an opinion to Honorable F. T. Stockard, Commissioner of Securities, held that the issuing of a certificate similar to that to be issued by the Fortified Investment Company and The Franklin Society constituted said corporation a bond investment company, which required the deposit of one hundred thousand dollars with the State Treasurer. Mr. Harrawood said the following:

> "This article (relating to bond investment company) would seem to be more particularly intended for the regulation of corporations which offer for sale bonds, certificates or debentures, on the partial payment plan or installment plan for investment purposes."

The Fortified Investment Company and The Franklin Society propose to issue certificates on the partial payment plan or installment plan in which the investor pays a certain amount annually for a period of fifteen years, which at the expiration of said time the investor receives a fixed sum. While provision is made for security, by virtue of the privilege and conditions and terms attached to the certificate, yet said security is not deposited with the State Treasurer.

From the above it is our opinion that the Fortified Investment Company and The Franklin Society, when such issue the proposed partial payment certificates, come within the provisions of Article 13, Chapter 32, R. S. Mo. 1929, and such must post the deposit required by Section 5060, supra.

III.

THE MISSOURI SECURITIES ACT.

Having held that the Fortified Investment Company and The Franklin Society were amenable to the provisions of the statutes relating to bond investment companies, we deem it unnecessary to discuss the Missouri Securities Act as we believe the above answers your inquiry.

As requested, we are returning herewith all the papers and exhibits appended to your letter.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG
Encs.

TRADE-MARKS: What constitutes an infringement of trade-marks for similarity.

September 14, 1936. 9-15

FILED 12

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges your letter and enclosures of September 10th, wherein you state as follows:

> "Will you please note the enclosed application to register Asper-Selzer as a trade-mark for tablet form of alkaline aspirin, and correspondence which we have had with the firm of Anderson and Whittington, St. Louis, Mo., on the subject. While we rejected the registration of this trade-mark under the general head of medicine, due to the fact that we have Alka Seltzer already registered as a medicine, the argument of Anderson and Whittington is the dissimilarity of one medicine against the other.
>
> "We shall be glad to have an opinion from you so we may know how to proceed in the matter."

The applicant in the letter dated August 8th asks reconsideration of his trade-mark, and states as follows:

> "We enclose herewith application of S. A. Whittington for registration of trade mark consisting of the hyphenated word "ASPER-SELZER", together with the fee of one dollar.
>
> "This application was returned by your office as being in conflict with the already registered name "ALKA SELTZER".

We request your re-consideration of the application and offer the following suggestions.

"The two products are dissimilar both in their claimed effects and in their ingredients. The effective ingredient, not claimed to be present in Alka Seltzer, is monoacetic-acidester of salicylicacid, or aspirin. Trade names applied to the various forms of aspirin commonly use the shortened word 'asper'. It immediately distinguishes the product as one whose active element is aspirin and is therefore not in any way to be confused with Alka Seltzer or similar alkaline effervescents.

"The word 'seltzer' is in common use and in the public mind denotes effervescence. There are Alka Seltzer, Bromo Seltzer, and the more common seltzer water.

"By the union of the two commonly understood words, we have Asper-Selzer, an effervescent form of aspirin, differing from Alka Seltzer in its active ingredient, and differing from, for instance, Asper Gum, by its form.

"Far from intending to infringe upon Alka Seltzer, or for that matter Bromo Seltzer, we have purposely gone out of our way and, to some extent at least, prejudiced ourselves in the eyes of a discriminating public by misspelling the word 'seltzer' in order that an independent and distinctive recognition might attach to our product."

We wish to say in the very beginning that the reports are full of decisions dealing with the question of infringement of trade-marks and trade-names where the charge is similarity, and it has therefore been frequently said that each case must depend upon its own circumstances. Thus in the case of Lambert Pharmacal Co. v. Bolton Chemical Corp., 219 Fed. 325, l. c. 328, the court said:

"A discussion of the many cases in which similarities have, or have not, been thought infringements, serves no end;

> applications of the accepted principle no doubt vary, but no two cases are alike. One must trust one's own sense of the likelihood of confusion and the absence of any justification for the defendant's choice of name.

And in the case of Gehl v. Hebe Co., 276 Fed. 271, l. c. 272, the court said:

> "A question of similarity of trade-names as applied to a particular product must of necessity be largely a matter of impression. From absolute copy of a name to one which is radically and essentially different there are names innumerable, with varying degrees and shades of difference; and it would be impossible to lay down any general line of cleavage between infringing and noninfringing names."

However, since the decisions yield general principles, they may be helpful in disposing of the particular case.

There are a group of cases which hold that whether a trade-mark infringement exists does not depend solely on similarity to the eye or ear, but on whether there is such similarity as readily leads the mind of customers to confusion. The case of American Lead Pencil Co. v. L. Gottlieb & Sons, 181 Fed. 178, l. c. 180, announces the above principle and states as follows:

> "I have no difficulty in finding that the phrase 'Knoxall' is an infringement of the phrase 'Beats-All'. There is no such limitation as the defendant puts upon the infringement of a trade-mark; i.e., that the similarity must go only to the eye or ear. The question cannot be treated in any such technical manner, for always the substantial question is whether the defendant is likely to steal the complainant's trade by the use of the trade-mark in question. I am quite satisfied in this case that there is such similarity between the two phrases as would readily lead in the mind of customers to confusion; a case in point is the infringement of

> 'Keepclean' by 'Sta-Kleen.' Florence Manufacturing Company v. J. C. Dowd & Co. (C.C.A.) 178 Fed. 73. There are many other decisions in the books which show that it is not alone similarity to the ear or eye which constitutes infringement."

Another group of cases lays emphasis on the principle that it is not necessary to constitute infringement of a trade-mark that the similarity be such as to deceive a cautious purchaser, but it is sufficient if it would deceive the ordinary and unwary purchaser. Thus in the case of Allen v. Walker & Gibson, 235 Fed. 230, l. c. 237, we find the court using the following language:

> "In law the trade-marks are the same if, when applied to the same class and kind of goods, they so clearly resemble each other as to deceive the ordinary purchaser, who gives such attention to the same as the ordinary purchaser usually gives, and cause such purchaser to purchase the one thing, supposing it to be the other. It is not necessary that the similarity must be such as to deceive and mislead the cautious purchaser. It is sufficient to show the similarity is such as to deceive the ordinary and unwary purchaser."

And in the case of Drummond Tobacco Co. v. Tinsley Tobacco Co., 52 Mo. App. 10, l. c. 26, we find the following statement by the court:

> "It is not essential to the right of relief to show that anyone was actually deceived. Filley v. Fassett, 44 Mo. 168."

Then there is the principle that where there is a doubt as to whether a word for which registration is sought as a trade-mark is deceptively similar to a word already registered and applied to the same class of goods, the doubt will be resolved in favor of the protection of the public. To this effect is the case of Lambert Pharm. Co. v. Mentho-Listine Chem. Co., 47 App. Cases (D.C.) 197, l. c. 198, wherein the court said:

> "It is agreed that the goods on which the marks are used are the same, and that the only question before the court is whether the marks are so similar as to be liable to create confusion in trade. Passing over the possible non-

> registerability of the mark because it is the name of the applicant company, we will dispose of the case on the single question of the deceptive similarity of the marks. The case is ruled by Re Barrett Mfg. Co. 37 App. D. C. 111, where the word 'Creo-Carbolin' was held to be deceptively similar to the word 'Carbolineum.' It was there held that the prefix 'Creo' did not render the marks dissimilar, and the same is here true of the prefix 'Mentho.' Besides, there would be nothing to control the manner in which the prefix might be printed so as to give especial prominence to the word 'Listine.' Where there is doubt it should be resolved in favor of the protection of the public."

In the case of National Food Products Corp. v. Jell-O Co., 19 Fed. (2d) 797, the court in holding that the registration of the trade-mark "Jell-O" precluded another's registration of the trade-mark "Mel-O" for use on goods of the same descriptive properties, said:

> "The opposition is based upon the ground that 'Mel-O' is deceptively similar to opposer's trade-mark 'Jell-O,' and, when so applied to the same description of goods, will likely cause confusion in trade, to the serious injury of the opposer.
>
> "Each party has taken considerable testimony in the case, and both have filed briefs. We do not find it necessary, however, to enter here into a detailed discussion of the evidence and arguments, for in our opinion the words 'Jell-O' and 'Mel-O' are so obviously similar both in sound and appearance that the use of both as trade-marks upon goods of the same descriptive properties would manifestly be likely to mislead the purchasing public, and produce confusion in the trade."

Can it be said then that the words "Asper" and "Alka", when combined with the word "Seltzer", are so similar that they would readily lead the mind of customers to confusion, remembering that the similarity need not be such as to deceive a cautious

purchaser, but that it is sufficient if it would deceive the ordinary and unwary purchaser, and further remembering that if there is a doubt it is to be resolved in favor of the existing mark for the protection of the public?

Our reply is in the negative, and we rely on the following authorities to support our position.

In the four cases that follow, only one word was involved in the trade-mark, but they have a similarity in the hind part, and the difference is in the front part.

In the case of Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189, l. c. 193, the court in holding that the word "Valvoline" did not infringe upon the word "Havoline", said:

> "We then come to the question of trade-mark infringement. I am of the opinion that the words are distinct from each other and that there is no confusion. There are, of course, many cases in the books in which the courts have made clear that they cannot be deceived by disingenuous distinctions (N. K. Fairbank Co. v. Central Lard Co. (C.C.) 64 Fed. 133, and many others which could be cited); but here there is a real distinction in sound, in appearance, and, popularly speaking, in meaning."

And in the case of L. P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co., 253 Fed. 914, l. c. 915, the court in holding that the word "Spearmint" was not infringed by the word "Peptomint", said:

> "'Peptomint' is so different in appearance and sound that there would be no infringement, even if 'Spearmint' were a proper trade-mark."

And again in the case of Davies-Young Soap Co. v. Selig Co., 16 Fed. (2d) 352, the court in holding that the trade-mark "Selco" was not so deceptively similar to the mark "Dysco" as to preclude registration of the former for use on similar goods, said:

> "We do not find it necessary to review or discuss the various cases which have been cited by counsel, but content ourselves with saying that in our opinion

> the words 'Dysco' and 'Selco' are not so similar, either in appearance or pronunciation, as to make confusion in the trade probable."

And in the case of Switzer v. J. N. Collins Co., 23 Fed. (2d) 775, the court in holding that the trade-mark "Honeymels" for use on candy did not infringe on a prior mark "Buttermels", said:

> "Appellant opposes the registration by appellee of the trade-mark 'Honeymels' for use on candy. The opposer is the prior user of the mark 'Buttermels' as a trade-mark for candy.
>
> "Unquestionably the words 'butter' and 'honey,' standing alone, are descriptive; but, when joined to the suffix 'mels,' they are nothing more than suggestive, and are subject to use as valid trade-marks. The suffix 'mels,' meaning sweets, has had a use on candy in connection with the mark 'caramels' long prior to the adoption and use of opposer's mark. Indeed, the name 'caramels' is a common one, extensively employed to refer to candy mixtures of a popular kind. Both parties have borrowed this suffix, and by combination with descriptive terms have constructed legitimate trade-marks. The suffix 'mels' being common to both marks, the distinctive feature is between the words 'honey' and 'butter.' It was properly held by the Commissioner that no confusion could arise from the use of these two words in connection with the same quality of goods. With this holding we agree."

The following two cases are more in keeping with the instant case in that there is an identity between the second word of the trade-mark, but there is no substantial similarity between the first word of the former and the first part of the latter, either in appearance, sound, or meaning.

In the case of Potter Drug & Chemical Corp. v. Pasfield Soap Co., 102 Fed. 490, l. c. 493, the court in holding that the use of the words "Cuticle Soap" did not infringe complainant's trade-mark"Cuticura Soap", said:

> "The remaining question is whether the use of the words 'Cuticle Soap' by the defendant infringes complainant's trade-mark, 'Cuticura Soap.' The words are to a considerable degree unlike to the eye, unlike to the ear, unlike in spelling, unlike in meaning, and unlike in suggestion. The complainant's word, 'Cuticura,' suggests that the soap is curative in its application to the skin. The defendant's word, by itself, has no such meaning, although the indorsements upon the back illustrate that it is recommended for various diseased conditions of the skin. But such recommendation is quite apt to accompany the advertised sale of any soap used for toilet purposes, and it is quite beyond the power of the complainant to monopolize such advantage."

And in the case of Coca-Cola Co. v. Carlisle Bottling Works, 43 Fed. (2d) 101, l. c. 114, the court, after reviewing numerous authorities, held that the trade-mark "Roxa Kola" was not an infringement on the trade-mark "Coca-Cola", and said:

> "I think, therefore, that I am justified in drawing from this survey the general rule that in such cases where the front part of the two trade-marks involved differ in appearance, sound, and meaning, there is no infringement even though there may be similarity amounting to identity in the last parts. It is only a very exceptional case which will not be governed by this rule. Possibly deeper reflection on these cases and a wider survey might affect this statement, but I shall accept it as sound in disposing of this case. What do we find here? There is identity between the second word of defendant's trade-mark and the second part of plaintiff's compound word, but there is no substantial similarity between the first word of the former and the first part of the latter, either in appearance, sound, or meaning. The first part of plaintiff's compound word has some meaning. It at least suggests that plaintiff's article has some

> connection with the coca leaf as well as the cola nut. The first word of defendant's trade-mark has no meaning. It is purely arbitrary. In determining the question as to the similarity in appearance and sound, note should be taken of how well known plaintiff's article is. Its trade-mark has been burnt into the consciousness of people generally. Instinctively one recalls in memory its appearance and sound. It would seem to be well-nigh incredible that one calling for 'Coca-Cola' and furnished a bottle of defendant's article would think that he was receiving plaintiff's and would not at once recognize that he was not."

The words "Asper" and "Alka" are to a considerable degree unlike to the eye, unlike to the ear, unlike in spelling, unlike in meaning, and unlike in suggestion. The word "Alka" suggests alkaline, while the word "Asper" suggests aspirin. Again, as stated in the Coca-Cola case, supra, "Alka Seltzer" has been so well advertised in the press and radio, "that it has been burnt into the consciousness of the people generally."

From the foregoing, we are of the opinion that the words "Asper-Selzer" are not an infringement upon the trade-mark "Alka Seltzer", and therefore subject to registration.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

TRADE-MARKS: Rules to be followed in trade-marking slogans.

September 24, 1936. 9-24

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

FILED
12

Dear Sir:

This department acknowledges your letter of September 21st wherein you state as follows:

> "We have been asked to register the label on the enclosed application as a trade-mark by Moerschel Products Company, and are in some doubt about it. Will you please advise us if in your opinion it can be registered. "

The application states that the essential words sought to be trade-marked are "Dealers in Temperature", and that the slogan has been used by Moerschel's in connection with their ice and coal business prior to the year 1926.

Hopkins on Trademarks, 4th Ed., p. 15, makes the following statement with reference to trade slogans:

> "The catch-phrases, advertising phrases or slogans used in trade are governed by precisely the same legal doctrines as tradenames. 'No distinction in fact or principle can be found between a trade-name and a trade slogan.'"

The legal principles involved in determining whether the words in issue may be trade-marked are fully set out in the case of Iowa Auto Market v. Auto Market & Exchange, 197 N. W. 321, l. c. 323, wherein the court said:

> "Words that are generic, or which in their primary meaning are merely descriptive of the goods or business to which they are applied, or are in common use for that purpose, or which convey facts applicable with equal truth and right to others, cannot be exclusively appropriated as a trade-mark. It has been frequently said that no one can secure a monopoly upon the adjectives of the language. 38 Cyc. 696, 708, 722; Koehler v. Sanders, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; Choynski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476; Clinton Metalic Paint Co. v. Metalic Paint Co., 23 Misc. Rep. 66, 50 N. Y. Supp. 437; Royal Baking Powder Co. v. Sherrell, 93 N. Y. 331, 45 Am. Rep. 229; Lawrence Manufacturing Co. v. Manufacturing Co., supra; Bolander v. Peterson, supra.
>
> "But descriptive terms, or such as others might also truthfully use, may, by long use in connection with the goods or business of a particular dealer, come to be understood in a secondary sense as designating the goods or business of such dealer, and in such case their deceptive use by another will be restrained as unfair competition. 38 Cyc. 764, 769; O. K. Bus & B. Co. v. O. K. Transfer Co., 63 Okl. 311, 165 Pac. 136, L. R. A. 1918A, 956, and cases cited in note; Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511; Dennison Mfg. Co. v. Thomas (C.C.) 94 Fed. 651."

In determining that the words 'Auto Market' were generic and could not be appropriated as a trade-mark or trade-name, the above court further said:

> "The words 'Auto Market' are merely descriptive of the thing sold and the place where sold. Taken either singly or in combination they are generic. They are merely descriptive of the business there carried on. They are no more distinctive of the article sold by appellant or its place of business than would be the words 'shoe store' or 'meat

> market.' They cannot constitute a trade-mark or trade-name, the right to the exclusive use of which will be secured to one in preference to others engaged in the same business. Bolander v. Peterson, supra, Choynski v. Cohen, supra; Koehler v. Sanders, supra."

In the case of Groceteria Stores Co. v. Tibbett, 162 Pac. 54, l. c. 55, the court in holding that the word "groceteria" was a proper trade-name and entitled to protection from infringement, said:

> "Respondent's second assertion is based on the ground that the word 'groceteria' is descriptive of the grocery business, and therefore is not such a word as could become the subject of a trade-mark. It would seem that the statute above quoted would be controlling here, and answer this argument contrary to respondent's contention; but, in any event, we think this argument without merit, since neither the word 'groceteria,' nor any syllable, nor any successive syllables thereof, constitutes any word in the English language, and it is admitted that appellant was the first to use this word. It is therefore a fictitious or fanciful and original name, and appropriate for a trade-mark label so far as this contention is concerned, and respondent has pirated that word. Paul on Trade-Marks, Sec. 49; Sebastian on Trade-Marks, pages 55-64."

And in the case of Furniture Hospital v. Dorfman, 166 S. W. 861, 179 Mo. App. 302, l. c. 307, the court in holding that the name "Furniture Hospital" was capable of being appropriated as a trade-mark with a secondary meaning, said:

> "Of course this rule is qualified by the further rule that names which are mere descriptive terms of the business and generic in their nature are not capable of being appropriated by any one. Hence if the name sought to be protected and claimed to be infringed upon and unfairly

> used is one which may be used by every one in an honestly descriptive and non-deceptive manner, the court may declare, as matter of law, that there can be no unfair competition in the use of such terms. For instance, no one could appropriate the name of 'Swedish Snuff Store' or 'Felt Hat Store,' 'Law Book Store,' 'Divinity Book Store' or any such name as would simply notify the public that a particular class of business or merchandise was carried on or kept there."

And on page 310 of the opinion the above court said:

> "So that upon the question of whether a demurrer to the petition should have been sustained, the case comes down to the inquiry whether or not the name 'Furniture Hospital' is one that in law is capable of being appropriated as a trade name with a secondary meaning.
>
> "In our opinion it is, or at least it is not such a name so purely descriptive of the business as to be wholly publici juris, and to be declared such as a matter of law. In the first place, it is shorter, more euphonious, and striking than the prosy words 'repair shop' suggestive of dust and dingy, battered old articles of uncertain age, and still more uncertain, doubtful origin and history. There is a novel, figurative suggestion and association of ideas in the name 'Furniture Hospital' bringing to the mind not only the idea of a homely broken article being merely mended and repaired, but also of its being tenderly cared for with a loving appreciation of its innate beauty and the possibility of restoring it to its former finish and perfection. A lover of restored antique furniture, much in vogue now-a-days, would be much more quickly attracted to the name 'Furniture Hospital' and more apt to take his ancient mohogany there for restoration, than he would to an ordinary 'repair shop.' He would remember the name longer too."

If the words sought to be trade-named were "Dealers in Ice and Coal", such words would simply notify the public of the particular class of business or merchandise that was carried on or kept by Moerschel Products Company, and under the authorities cited could not be exclusively appropriated as a trade-mark or trade-name. The words here sought to be trade-marked, however, bring to mind not only the idea that ice and coal are being sold, but that means are offered of controlling sensations of heat and cold, a subject very common in every day expression. This is a figurative suggestion and more likely to be remembered than ice and coal.

From the foregoing, we are of the opinion that the words "Dealers in Temperature" as sought in the above application are the proper subject of a trade-mark or trade-name.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

TRADE-MARKS: Construction of U. S. C. A., Title 15, Section 85, Page 25.

October 1, 1936. 10-1

FILED
12

Hon. Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion under date of September 24th, as follows:

> "Will you please note attached application to register trade-mark together with correspondence with Mr. Richard C. Southall of Kansas City.
>
> "We rejected registration of the trade-mark Professional Uniform in accordance with an opinion given us by your office under date of April 12, 1934, signed by Mr. Franklin E. Reagan, in which he states that mere descriptive terms of an article are not subject to registration under the trade-mark law.
>
> "Inasmuch as Mr. Southall has requested that the matter be referred to you, we should like to have your opinion in the matter."

The attached letter requesting that you reconsider rejection of the application for trade-mark is as follows:

> "I am returning the application to register a trade mark returned in your letter of the 23rd and request that the same be registered as provided by Section 14,329, which provides that any 'particular name, term, design or device' may be registered. I call your at-

tention to the fact that this is a 'device or design' and not a mere name or words of description. You will note the special arrangement of the design which begins with a large 'P' and ends with a small 'L'. The fact that it spells 'Professional' is incidental so long as the arrangement of the letters is distinctive.

"As an example I call your attention to a well known patent medicine manufactured by the 'Black and White Products Co.' of Memphis, Tenn. Their trade mark (registered in Washington) are the words 'Black and White' on a background of a square half black and half white. The words alone would not be subject to registration but when placed on a black and white background it makes them distinctive. So our special arrangement of the letters composing the words 'Professional'.

"If there is still doubt in your mind I would like to have the instant application, together with this explanation submitted to the attorney general. As a matter of fact I do not find that the statute or the courts give the attorney general authority to pass on applications, the statute designating what may and may not be registered and the only inhibition being words already in use.

"I believe that after further consideration and study of this design you will issue the certificate. If not please advise."

The application sets out that the essential feature of the mark is the arrangement of the letters, which begins with a large "P" and ends with a small "L" in staggered formation.

United States Code Annotated, Title 15, Section 85, page 25, sets out what trade-marks may be registered, in part, as follows:

> "Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner * * * shall be registered under the terms of this subdivision of this chapter."

Nims on Unfair Competition and Trade-Marks, Section 229, subsection (a), page 628, in discussing the above portion of the statute, quotes from Ex parte Polar Knitting Mills, reported in 154 Off. Gaz. 251, and states that:

> "If a mark is written or printed in a distinctive style, it may be registered. 'It is believed that the controlling principle underlying the requirement of the statute that a mere name unless written or printed in a distinctive manner may not be registered, is that the distinctive manner in which the name is displayed must be of a character as to give such a distinctive impression to the eye of the ordinary observer as to outweigh the significance of the mere name.'"

Ex parte The Craig Tractor Company, decided by the Commissioner of Patents and reported in 263 Off. Gaz. 329, held that the words "Craig Tractor" in staggered relation, with a heavy black line over the word "Craig" and a heavy black line under the first three letters thereof, the bottom black line forming the top of the first letter of the word "Tractor", was registrable as being distinctively displayed.

The only thing about the arrangement of the word "Professional" that is herein claimed to make it distinctive is its staggered formation. In the above case the words were also staggered, but, as pointed out, there were additional characteristics that made the arrangement distinctive, and we are of the opinion that the above decision is not authority for the instant case.

In the case of Pittsburgh Brewing Co. v. Ruben, 3 Fed. (2d) 342, l. c. 344, the court in holding that the trade-mark "Tech" printed in white script letters across plaid background was not violative of the statute, the plaid background being a bona fide and substantial part of the mark, said:

> "We agree with the Commissioner that the mark which the applicant applies for does not fall within the prohibitions of section 5 of the Trade-Mark Act (Comp. St. sec. 9490), to-wit, that no mark shall be registered which 'consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner,' since the plaid background upon which the name appears is a bona fide and substantial part of the mark, and is not 'a mere device or contrivance to evade the law and secure the registration of nonregistrable words.'

The distinguishing characteristics of this case from the one at hand are again self-apparent.

In the case of National Cigar Stands Co. v. Frishmuth Bro. & Co., 297 Fed. 348, l. c. 350, the court in discussing whether the word "Nationals" which was in staggered formation, as in the instant case, but with the addition of a heavy black line under the word, was so distinctive as to comply with the statute, said:

> "Had this word been a distinctive feature of appellee's corporate name, which had been selected for no ulterior purpose, a different case would have been presented; but, even then, it could not have been said that the manner in which appellee printed its mark constituted compliance with the statute. We have said that the controlling principle underlying the requirement of the statute is that a mere name may not be registered, unless so displayed as to give such a distinct impression to the eye of the ordinary observer that the significance of the mere name is outweighed. In re Artesian Mfg. Co., 37 App. D. C. 113."

Again in the case of In re Nisley Shoe Co., 58 Fed. (2d) 426, l. c. 427, the court in holding that the arrangement of the letters forming the word "Nisley's", which was written in distorted block type, was violative of the statute, said:

> "With reference to appellant's third contention, we cannot hold that the word

> 'Nisley's,' as used by appellant, is written or displayed in a particular or distinctive manner within the meaning of said section 5. The Examiner of Trade-Marks in his decision, as heretofore noted, stated that the distorted block type used by appellant was such as may be found in many signs and advertisements. He further stated that 'it is not believed that the public would see in it anything unique or distinctive.' We agree with this conclusion of the Examiner, which was affirmed by the Commissioner. We may take judicial notice of the fact that it is not uncommon in signs and advertisements to use type of the character employed by appellant in the formation of the word 'Nisley's.' We are of the opinion that the proper construction of the words 'particular or distinctive manner' in the proviso of section 5 referred to is that the word or words constituting the mark shall be written, printed, impressed, or woven in such a manner as to form a distinct impression upon the eye of the observer, to the extent that he will remember such particular or distinctive form and rely upon it, in part at least, in ascribing origin of the goods to which the mark is applied."

See, also, In re American Steel & Wire Company of New Jersey, 81 Fed. (2d) 397, l. c. 398, to the same effect.

From the foregoing, we are of the opinion that the public will not see anything in the word "Professional", as used by applicant in the instant case, as being unique or distinctive, and that to permit same to be trade-marked would be violative of the above statute requiring that the word or words constituting the mark be written, printed, impressed or woven in some particular or distinctive manner.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

BULL FIGHTS: Whomsoever shall use any designs to ttract, provoke, harass or torment any bull shall be guilty of baiting a bull. The giving of any entertainment known as Corrida De Toros (Running of the Bulls) is prohibited.

10-8

October 8, 1936

FILED
12

Mrs. Nat S. Brown
4th at Chouteau
St. Louis, Missouri

Dear Mrs. Brown:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "I am wanting to put on an entertainment to raise funds to carry on the work of Welcome Inn and have under consideration, this Corrida De Toros.
>
> I want to know if you will be kind enough to give me an Opinion as to whether this would be permitted under our State Laws, and return this copy to me for my files."

Appended to your request is copy of a letter explaining the entertainment to be given by the Diaz Amusement Corporation, which reads as follows:

> " CORRIDA DE TOROS
>
> 1. PROLOGUE. Music playing the national anthems of America and Mexico. Following this there will be a procession of Matadors and their attendants, including horses in full regalia, into and around the arena, said procession to be accompanied by Spanish music. This portion of the program makes a very beautiful and awe-inspiring

introduction for the main event. After all such formalities have been completed, the Matadors and their attendants take their appointed places in and around the arena.

2. Bugles then herald the main attraction, and the gates are thrown open permitting the bull to rush into the ring. An accurate and descriptive picture of a Spanish Bull Fight is then enacted in the ring, without the slightest cruelty to any of the animals. (The first part of an authentic Spanish Bull Fight commonly known as the Picador Act, is omitted as in this act horses are used and we wish to obviate any chance of injury to the horses or the men.) Therefore, instead of using horses the Matadors use the black and red capes to lead on the bulls. The performance itself is very thrilling giving a wonderful display of artistic footwork and agility on the part of the Matadors and their attendants.

3. Placing of Banderilleros. Instead of the real banderillero darts, which darts are used to weaken and enrage the bull, we use a beautifully decorated dart with a vacuum cup on the end. The darts may thus be thrown, and fasten themselves upon the bull without in any way causing him physical injury or harm.

4. The Matador then brings the event to a climax by skilfully maneuvering the bull into position and then makes the point of contact (with rubber sword) where the muleta is placed at

> the back of the neck, terminating the bull fight.
>
> The act above described lasts about twenty minutes. The bull is retired from the arena and later sold, as the same bull is never used twice for any act--although these bulls are specially bred for this purpose, are very powerful and in no way are injured or exhausted by an act of such short duration. All animals are well taken care of and are under a veterinarian's care at all times."

The question as to whether or not the entertainment that you desire to put on, to enable you to raise funds to carry on the work of Welcome Inn, turns upon the construction of Section 4397, R.S. Mo. 1929, relating to bull baiting. Said Section reads as follows:

> "Any person who shall keep or use, or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, and any person who shall encourage, aid or assist or be present thereat, or who shall permit or suffer any place belonging to him or under his control to be so kept or used, shall, on conviction thereof, be guilty of a misdemeanor."

In interpreting said Section, we construe the word "baiting" as meaning to provoke, harass, torment, persecute and exasperate. In this respect, your attention is directed to the definition of "baiting" as given by Bouvier's Law Dictionary, Page 317, which reads as follows:

"to bait is to attack with violance; to provoke and harass"

Webster's New International Dictionary in defining the word "baiting" states:

"to persecute, harass or torment; to exasperate with repeated attempts"

In the case of State ex rel Crow vs. Dennis Canty, 207 Mo. 439, the Supreme Court had before it for consideration the enjoining of respondents from giving a public bull fight (in an arena prepared for that purpose on the premises of Barrett Realty Company). In the lower court, a hearing was had and the finding was had for the respondents and a decree was entered dissolving a temporary injunction and dismissing the bill. Thereafter, in due time, the attorney general appealed the case to the Supreme Court, which court held that the lower court erred in dismissing the petition and in refusing to perpetually enjoin the Barrett Realty Company from permitting the use of its permises for the holding of bull fights and directing the lower court to reinstate the case and enter a decree perpetually enjoining Barrett Realty Company from holding bull fights in and upon its premises. In so doing, the court ruled that the giving of bull fights, under the facts, was a public nuisance, debasing in its character and debauching in its influence on public morals.

The evidence developed by the State tended to show that, at the beginning of the performance, there was a parade around the arena with bull fighters in Spanish costumes, leading horses and after retiring, one of the gates was opened and a bull was let in. The evidence disclosed that the bull came in in a run and a jump. It was also developed that several men were standing around fully dressed for the occasion called matadors with red cloaks and capes and as soon as the bull entered, his attention was attracted to one of these men, who had thrown his cloak in the face of the bull and then jumped away. From time to time, each of the men participants went through the same performance.

After each display, one of the men would go through the form of killing the bull with a cane, as the sword is thrown in the Mexican and Spanish arena but the bull was not, in fact, stabbed, killed or injured by the act. The agility and quick footwork on the part of the matador tended to excite and madden the bull so that he would rush around the arena, attempting to gore one of them. Upon one occasion,

one of the matadors was gored and smashed against the side of the arena. Various "escapes" were in parts of the arena behind which the matadors would dodge when too closely pursued by the bulls and the man who was injured was trying to get behind one of them when he was gored.

Another matador was attacked by the bull during this performance and knocked to the ground and was in great danger of being killed but another matador came to his assistance, thereby attracting the attention of the bull. The bull was kept in the arena fifteen or twenty minutes.

The facts further revealed that other bulls were brought in, from time to time, and acted in the same manner as the first bull. The bulls were greatly infuriated and would snort and bellow when charging the men. The evidence further revealed that these bulls were raised for fighting purposes and none other.

Analyzing the facts as presented by the resume of the proposed entertainment with the facts as just previously set out, we find in the proposed entertainment that in the beginning of the attraction, bugles herald the main attraction and the gates are to be thrown open, permitting a bull to rush in the ring. Practically identical to the facts as presented in the above cited case. We also note that the matadors are to use black and red capes to lead on the bulls and that the performance itself compels a display of artistic footwork and agility on the part of the matadors and their attendants. Thus, it may be seen that the facts in the proposed entertainment are analagous with the facts in the above cited case except that red cloaks and capes are used instead of black and red capes.

In the fourth paragraph of the resume of the proposed entertainment, it is stated that the climax to the event is had by skillfully maneuvering the bull in position where the point of contact is made with a rubber sword, thus terminating the bull fight. The facts stated in the above case reveal that instead of a rubber sword being used, a cane was used to go through the form of killing the bull.

You will also note from the facts of the case cited above, that the bull is kept in the arena fifteen or twenty minutes and then, again, in the resume of the proposed entertainment, you will note that the act described lasts about twenty minutes and the bull is retired from the arena.

It is to be noted from the facts cited in the above case that the bulls were produced for fighting purposes and none other and that the facts of the resume of the proposed entertainment state that the bulls are especially bred for this purpose.

The court in the above case in discussing what was deemed to be a public nuisance stated on Page 449:

> "any act which is an offense against the public order, common good and public decency or morals, or any public exhibition which tends to corrupt the morals, to disturb the peace or the general order and welfare of society, is a public nuisance; * * *."

Then again, on Page 450, the court said:

> "According to the evidence in this case there can be no doubt but what the bull-fights in so far as the bulls were concerned were genuine fights and partook of the ferocity and brutality which has ever characterized them in Spain and Mexico. Two matadors were knocked down and injured more or less by the bulls the first night, and might have been seriously injured or killed had it not been for the timely arrival and assistance of their associates; and two others were knocked down, one of them a crazy man, but both escaped injury, through the assistance of their fellows.
>
> "While it is true the evidence discloses that the matadors did not use the sword, as is the practice in Spain and Mexico in such fights, nor inflict injury or death upon the bulls, yet that very fact made it more hazardous and dangerous for the matadors. If they had been furnished with swords they would have

been more able to have stopped the mad career of the infuriated bull, and thereby escaped the deadly charge of the Socorro brute, without relying exclusively upon the timely arrival and prompt assistance of their fellow matadors, or the convenient 'escapes' erected along the wall of the arena.

"The managers in disarming those poor bull-fighters and placing them in the arena with those mad bulls were almost if not quite as guilty of as great a crime as the Romans were in ancient times, who threw the criminals and Christians into the public arena with the wild beasts to be torn to pieces and killed by them for the edifice and amusement of the morbid and vicious populace.

"Today the matadors have modernized the arena and reduced the fighting largely to a science, and when properly armed they can defend themselves with some degree of safety, but when disarmed they are placed back on an exact plane and equality with the unfortunate Romans, except they have the 'escapes' behind which they may retreat if they are quick and dexterous enough to evade the swift and mad charge of the infuriated bull; otherwise he must share the same gory fate as the Romans of old, if perchance some associate does not in the nick of time divert his attention from him by a red flag. But in either event and under the most favorable circumstances and when the matadors are properly armed with swords they are often killed

or injured, as every one knows as a matter of history and common knowledge.

"The State is deeply interested in the lives and well being of all her citizens, and of those who come within her borders, and much more so than she is in the lives and safety of the bulls. The immunity of the bull from punishment under the system of fighting as shown by the evidence in this case is no manner or degree lessened the interest of the State in the lives and limbs of the men who were engaged in those highly dangerous combats and struggles."

CONCLUSION

In light of the above, it is the opinion of this department that whomsoever shall use any designs to attract, provoke, harass or torment any bull shall be guilty of baiting a bull.

We further conclude that the giving of such a public entertainment, such as has been indicated by the facts submitted, is a public nuisance, such that may be enjoined by the proper authorities whose duty it is to protect the people from such nuisances.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr
(Acting) Attorney General

RCS:RT

MISSOURI CREDIT UNION ACT: Minors may own shares but can rescind contract and demand return of investment; in instant case minor borrowing value of actual investment, credit union should insist on mother executing promissory note; if not specifically stated in by-laws, it is immaterial what purpose money borrowed by minor is used for; minor has same right in respect to borrowing in excess of holdings as adult member; minor may vote in election of officers.

October 17, 1936.

1019

FILED
12

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of October 3, which is as follows:

> "Section 13 of the Missouri Credit Union Law reads as follows: 'Minor May Own Shares--Shares may be issued in the name of a minor and in trust in such way and manner as the by-laws may provide.'
>
> "Please see copy of letter from Father Bernard A. Timpe of St. Boniface Credit Union attached. The credit union's by-laws merely repeat the above language of the statute and do not amplify it in any way.
>
> "Father Timpe uses an illustration where a minor owns shares in a credit union, valued at, say, $50.00 and fully paid. The minor has no legal guardian but his mother acts as 'natural guardian.'
>
> "May the minor borrow up to the value of his actual investment, $50.00, using his stock as collateral? Must his mother execute the promissory note to the credit union, or must there be a legal guardian appointed? Will it affect the situation if the money is to be used for the education of the minor? Or if the money is to be used for luxuries?
> "May the minor borrow in excess of his $50 holdings, the same as a member of the credit union who is of lawful age? If not,

there seems to be little inducement for a minor to become a member of the credit union. May the minor vote in election of officers of the credit union?

"In the above illustration, the 'natural guardian', the boy's mother, is not a member of the credit union. The boy is a member. There are many minor members of Missouri credit unions and your opinion will be sincerely appreciated."

It must be conceded that a minor has authority under the Missouri Credit Union Law the same as an adult member; the Act undertakes to give him such rights. In approaching the question of loans to minors, it is well to bear in mind that the law throws every cloak of protection around a minor, but offers none to the person or persons dealing with him. A minor is treated in law as an infant; therefore, it is not a question under the Act of the minor's rights, but the rights of the credit union in making loans to a minor. Section 2971, R.S. Mo. 1929.

In the case of Goerke v. Hampke, 274 S.W. 510, it was held that an infant's contracts are voidable and that Section 2971 is to shield an infant or minor against acts of folly or rashness as well as against the designs of unscrupulous persons. Therefore, irrespective of the fact that Section 13 of the Credit Union Act gives minor the right to own shares, a minor could rescind his contract and demand the return of the money invested.

Regarding your inquiry as to whether or not the mother must execute the promissory note to the credit union, we are of the opinion that this is optional with the credit union, but as stated heretofore, it is hazardous for the credit union to deal with the minor. As a precaution, the credit union could insist on the mother executing the promissory note along with the minor. In that event, the credit union would have to look to the mother for payment of the note if the minor refused to pay the same.

As to the purpose of the money borrowed, it is the opinion of this department that the by-laws would govern this situation, as the Act is silent as to the purposes for which loans may be made to share-holders. Therefore, in the absence of same in the by-laws, it is immaterial as to the purpose or use that may be made of the money borrowed by the minor. Sec. 16.

Hon. Dwight H. Brown #3 Oct. 17, 1936.

Regarding the right of a minor to borrow in excess of $50.00 holdings, it is our opinion that the minor has the same power and rights under Sections 10 and 16 of the Act with reference to obtaining loans as any adult member. However, we repeat that the credit union deals with the minor at its own peril. The same precaution may be used by the credit union as heretofore mentioned, i.e., obtain security from the mother or some other person.

Section 9 of the Missouri Credit Union Act refers to the election of officers, and in reply to your inquiry as to whether or not a minor may vote in the election of officers, we must say that there is no disqualification set forth, and in the absence of by-laws relating to the manner of conducting elections and the qualifications of the voters, it is our opinion that a minor may vote in such elections.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

ELECTIONS: When Constitutional Certificate to office shall issue.

December 15, 1936.

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated December 10, 1936, which reads as follows:

> "Referring to telephone conversation this morning, please note the enclosed certification of county officers-elect in Phelps County and amended certificate regarding the office of Sheriff, and give us your opinion regarding issuance of commission by this office."

We also acknowledge the exhibits attached to your request. By one exhibit the County Clerk on November 6, 1936, certifies that Roy L. Kirgan was the duly elected sheriff of Phelps County, receiving the highest number of votes for the office. By a subsequent certification shown by another certificate, the same county clerk on November 9, 1936, certifies to a recount of said votes pursuant to an election contest, certifying that Fred C. King received the highest number of votes for the office of sheriff of Phelps County. Both of these certifications are herewith returned to your possession.

What you want to know is whether your office, possessed with these two certifications of election should issue a certificate of election under the State Seal for the office of sheriff of Phelps County, and if so, to whom should it be issued?

Article V, Section 23 of the Missouri Constitution provides:

> "The Governor shall commission all officers not otherwise provided for by the law. All commissions shall run in the name and by the authority of the State of Missouri, be signed

> by the Governor, sealed with the Great Seal of the State of Missouri, and attested by the Secretary of State."

In the case of Nash v. Craig, 35 S. W. 1001, 134 Mo. 347, l. c. 361, the Supreme Court said in a similar election contest case.

> "The recount by the clerk takes the place of the canvass by the election officers. This rule has been generally recognized. The count by the clerk is called a recount."

In the case of State ex rel Attorney General v. Pool 41 Mo. l. c. 37, the Supreme Court said:

> "It is true there is no direct means pointed out by which the Governor is to be informed of the election of sheriff so as to enable him to execute the commission; and this is obviously a casus omissus, and leaves to him the responsibility of acting on such evidence as he may deem satisfactory."

In the case of State ex rel v. Clark, 52 Mo. 508, l. c. 512, the Supreme Court said:

> "The commission issued to the relator invested him with the title, and is prima facie evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law."

CONCLUSION.

This department is of the opinion that under the Missouri Constitution the Governor's commission should issue to the duly elected sheriff of Phelps County upon satisfactory proof as to who received the majority votes in the November election.

It is our opinion that the Governor's certificate should be issued to the successful person in the recount. To issue the constitutional certificate to one not able to sustain his title to office by a legislative recount in a Court of record would be to place a person duly elected by the recount to a disadvantage not intended by the Legislature when they provided a legal method of recount. The very purpose of a recount is to determine who has the prima facie right to the office, who is entitled to this certificate of office.

Respectfully submitted

WM. ORR SAWYERS:
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

PUBLIC OFFICERS: Mayor cannot compel city council to ratify his appointments; Mayor cannot make appointments without the consent of majority of city council.

May 20, 1936.

5-21

FILED
13

Mr. Carl T. Buehler,
Mayor of Eldon,
Eldon, Missouri.

Dear Sir:

This department is in receipt of your letter of May 5 wherein you make inquiries relative to the appointive officers of the City of Eldon.

Eldon has a population of more than 3,000 persons; therefore, according to statute, it is a city of the third class and its elections and appointments are governed by the laws relating to cities of the third class. Your first question in substance is:

> "Is there a state law compelling aldermen to ratify appointments of the mayor unless they can show that the appointee is not qualified or otherwise unfit for the position?"

Section 6733, R.S. Mo. 1929 is as follows:

> "The mayor, with the consent and approval of a majority of the members elected to the city council, shall have power to appoint a street commissioner and such other officers as he may be authorized by ordinance to appoint."

It is plain from the terms of the above section that the selection of the appointive officers can be made only by the Mayor with the consent and approval of a majority of the members of the city council. We are therefore of the opinion that the matter of ratifying your appointments is discretionary with the members of the council, and if said members see fit to refuse

to concur in the appointments you make, we know of no law that can compel them to do so.

Your next question is:

> "If the council gives the mayor permission to oust a certain appointee but refuses to ratify the mayor's appointee as successor, can the mayor place an appointee in charge until a permanent or legal appointment is made?"

The statute relating to removal of officers is Section 6729, R.S. Mo., 1929, which provides:

> "The mayor may, with the consent of a majority of all the members elected to the city council, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the council, sitting as a court of impeachment. Any elective officer may, in like manner, for cause shown, be removed from office by a two-thirds vote of all the members elected to the city council, independently of the mayor's approval or recommendation. The mayor may, with the consent of a majority of all the members elected to the council, remove from office any appointive officer of the city at will; and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the council, independently of the mayor's approval or recommendation. The council may pass ordinances regulating the manner of impeachment and removals."

Bearing in mind the terms of Section 6733, supra, it is the opinion of this department that you can make no appointments without the consent and approval of a majority of the members of the city council.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

FEES--CRIMINAL COSTS--JUSTICE OF THEPeace: Mileage fee in transporting prisoner more than 5 miles to preliminary in Justice Court is not a legal charge against the State or County,

(This opinion is in accord with opinion dated November 14, 1935 written to Judge Arthur S. Shaw, Excelsior Springs, Mo. No. 33)

May 21, 1936.

FILED
13

Honorable N. Elmer Butler,
Prosecuting Attorney,
Stone County,
Galena, Missouri.

Dear Sir:

We acknowledge your letter of April 28, 1936, together with the enclosed letter from Judge R. A. Andoe. Your request is as follows:

> "Please find enclosed letter from a Justice of the Peace regarding the fees of the Constable, as it states the matter on which he desires an opinion will you please give me that opinion?"

Judge Andoe's letter reads as follows:

> "In the matter of fees, of Constable Dale M. Davis of this township, Mr. Davis informs me that either the State Auditor or the Circuit Clerk, is cutting out certain fees of his in criminal cases.
>
> "The fee of which Mr. Davis complains, is where a defendant has been committed to the county jail, in default of recognizance, and when the case came up for trial or preliminary examination and the defendant requests and is granted a change of venue, and fails to give recognizance for his appearance before the Justice whom the cause is sent to. Sec. 3431 R. S. 1929 sets out that the constable shall convey the prisoner before

> the Justice to whom the cause is sent, to abide the judgement and order of the Justice in the premises. I have been allowing the Constable in my transcripts a mileage fee of ten cents per mile for this service as set out in Sec. 11777 which states that a Constable shall be allowed ten cents per mile actually traveled in serving any process Sec. 5431 states that the Constable shall perform this service, and I feel that he should be allowed a fee for his service, and I think that the fee of ten cents per mile is the proper fee. Would thank you to kindly submit this matter to the Honorable Attorney General of this state for his opinion."

The question here inquired about is whether the constable is entitled to a fee where he transports a prisoner who is charged with a crime from the jail to the court where his preliminary is about to be held, the distance being more than five miles.

Section 5431, R. S. Mo. 1929, places the duty on the constable to convey before the justice the defendant to abide the judgment and order of such justice in the premises, but is silent as to the fee therefor, if any.

Section 11777, R. S. Mo. 1929, has a provision relating to constable's fees that they shall be allowed fees for their services as follows:

> "And for every mile traveled in taking a criminal to jail and returning therefrom, provided the distance so traveled be more than five miles, the sum of, per mile . . . . . $ .10
>
> * * * * *
>
> "For each mile actually traveled in serving any process . . . . . .10"

The first quoted portion can not apply because the defendant or prisoner at that stage is not a "criminal" within the meaning of the law. Every man is presumed to be innocent until his guilt is shown and established by a trial or a plea of guilty, and this provision merely applies to criminals and the transporting thereof.

The latter quoted portion does not apply because the constable is not serving any "process". "Process" means the serving of a paper which has been issued under authority of the court and placed in the hands of the officer directing him to perform a certain duty.

In the case of Williams v. Monroe, 125 Mo. 574, l. c. 585, the court says:

> "In other words, not only must process be served in the manner prescribed by law, but the process itself must be the mandate of a court, judge or officer authorized by law to issue or require it to be issued. The stream can not rise higher than its source."

It is a well recognized principle of law that statutes relating to the compensation of officials are to be given strict construction.

In the case of State ex rel. Troll v. Brown, 146 Mo. 401, l. c. 406, the court says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed vs. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In the case of King v. Riverland Levee District, 279 S. W. 195, l. c. 196, the court says:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of

> contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

For a like holding, see the case of State ex rel. v. Gordon, 245 Mo. 12, l. c. 27.

The question of whether a change of venue is taken is immaterial from the viewpoint as I see it. The point is that if the defendant is a criminal and is being so transported, the constable so transporting him is entitled to the statutory fee, or if the constable is engaged in serving any process within the meaning of the law, he is entitled to the statutory fee above referred to, but there is no information revealed by this inquiry to the effect that the constable is engaged in either of these duties.

CONCLUSION

We are of the opinion that under the facts revealed by your inquiry, the constable in transporting the prisoner a distance greater than five miles to his preliminary hearing is not transporting a criminal, and that the defendant does not become a criminal in the eyes of the law until he has been convicted on a trial or has pleaded guilty, and that the constable in so transporting the prisoner is not serving any process within the meaning of the law, bearing in mind the above definition of "process" as defined by the Missouri Supreme Court,

and bearing in mind the fact that the statutes must be strictly construed with reference to the payment of fees, and that there is no statute authorizing the collection of a fee by the constable in so transporting said prisoner, it is a duty placed upon him by the statute to so transport the prisoner, and when an official duty is laid upon an officer by the statute and there is no explicit or clear authority by strictly construing the law which authorizes the payment of a fee for so doing, he is not entitled to a fee therefor, but must perform such services without compensation.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

RECORDERS--FEES: Recorder must charge fees for services in the amount provided for by law.

May 22, 1936

5-23

FILED
13

Honorable Walter J. Button
Circuit Clerk and Recorder
Benton County
Warsaw, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 15, 1936, which reads as follows:

> "I would appreciate your opinion on the following questions:
>
> "Must a Recorder charge an ex-soldier for certified copies?
>
> "Must a Recorder charge for release of chattel, that was drawn before August 1935?"

We are enclosing a copy of our opinion to the Honorable Elmer Hicklin, in which we held that no fee is now chargeable for the discharge of a chattel mortgage. This answers your second question.

Section 3955, R. S. Mo. 1929, provides in part:

> "* * * *and it shall be unlawful for any county clerk, circuit clerk, recorder, or any other officer of any court, or his deputy, or any person in his employ, to charge, collect or receive less fee for his services than is provided by law."

Section 3956, R. S. Mo. 1929, provides:

> "Any such clerk or officer violating the preceding section shall, upon conviction, be punished by fine of not less than one hundred dollars, and in addition shall forfeit his office, and it shall be the duty

of the judge having criminal jurisdiction to give this and the preceding section in special charge to the grand jury."

CONCLUSION.

- - - - - - -

It would unlawful for you to exempt an ex-soldier from paying fees provided for by law for such services.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

WOS:H

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

ELECTIONS; Appointment of judges in primary elections.

July 9, 1936.

FILED
13

Honorable Carter M. Buford,
Ellington, Missouri.

Dear Senator:

This department is in receipt of your request for an opinion with reference to the manner of appointing judges of election in the primary election to be held in Reynolds County.

Section 10287, R.S. Mo. 1929 provides:

> "The judges and clerks for primary elections held under this article shall be appointed in the same manner, and possess the same qualifications and consist of the same number as judges and clerks of general elections in this state: * * * "

Section 10206, R.S. Mo. 1929, pertaining to the appointment of judges of election in the general election, provides in part that four judges of election shall be appointed by the County Court for each election precinct in all of the counties of this state.

Section 10209, R.S. Mo. 1929, pertains to the method of appointment of judges of election, and provides:

> "All judges of elections appointed under the provisions of this article shall be selected by the county court from a list of persons furnished said court in the form and manner following: The political party that polled the largest number of votes at the last preceding general election and the political party that polled the next largest vote at said

> election shall, each, through its central committee, furnish to said county court at least fifteen days before the election, a list of names of persons qualified by law to serve as judges of election, double the number required for judges of said election, from which said list said county court shall, at least ten days before the election herein provided for, select and appoint the number of judges required to hold said election, taking one-half of the judges so appointed from each of said lists: Provided, that for the purpose of determining the political parties entitled to representation on the election board, the county court shall take the vote cast for governor throughout the entire state for the respective parties: Provided further, that if any political party, through its committee, shall fail to present a list of names as aforesaid, within the time aforesaid, then the said county court may select and appoint the requisite number of judges provided by law for said party."

Section 10208, Laws of Missouri, 1933, p. 238, provides for the appointment of additional judges of election, as follows:

> "In all precincts in this state that at the last preceding general election cast three hundred or more votes, at the same time and in the same manner as judges of election are appointed or elected, two additional judges of election for each such election district in the state shall be appointed or elected; three of the judges shall be taken from the political party that polled the largest number of votes at the last preceding general election and three of the

judges from the party that polled the next largest vote. The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters in the manner hereinafter provided."

The above statutes, in the opinion of this department, are controlling as to the appointment and method of appointment of judges of election in primary elections in Reynolds County.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH



COUNTY COLLECTOR: Should pay balances due on annual settlement

Liable for penalty of 10% per month until paid. When.

July 20, 1936

7-24

FILED
13

Mr. N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "Will you please give me an opinion on the following: In the matter of annual settlement of the County Collector -- when the settlement is made according to law and accepted by the County Court, when does it become necessary for the Collector to pay the balance due the County?
>
> "If the balance should be paid at the time of making settlement, is the Collector liable for ten per cent each month until paid?
>
> "Will you please rush me an opinion on this matter."

Section 9918, Revised Statutes Missouri 1929, requires the county collector to make an annual settlement with the county court at the term of the county court to be held on the first Monday in March.

Section 9932, Revised Statutes Missouri 1929, provides that the collector having made settlement, according to law, of county revenue by him received shall pay the amount due into the county treasury. Said section reads as follows:

> "Every collector of the revenue having made settlement, according to law, of county revenue by him collected or received, shall pay the amount found due into the county treasury, and the treasurer shall give him duplicate receipts therefor, one of which shall be filed in the office of the clerk of the county court, who shall grant him full quietus under the seal of the court."

Section 9933, Revised Statutes Missouri 1929, provides a penalty on the collector for failing to make payment of the amount due from him on settlement. Said section reads as follows:

> "Every collector who shall fail to make payment of the amount due from him on settlement, or in the time and manner prescribed by law, shall forfeit ten per cent. a month on the amount wrongfully withheld, to be computed from the time the amount ought to have been paid until actual payment. This section shall apply to all revenue collections made by him, whether for state, county, city, town, district or school taxes, general or special."

Section 9934, Revised Statutes Missouri 1929, provides a method of proceedings against a defaulting collector and his sureties. Said section reads as follows:

> "If any collector shall fail to pay into the county or state treasury the amount of taxes or revenue by him collected, due the state or county, respectively, at the times and in the manner by this chapter required, he and his sureties shall be liable

to pay ten per cent. per month upon the amount which he shall so fail to pay, as a penalty; and in case of such refusal, notice may be served upon such collector in default and his sureties, informing them that at the next term of the circuit court of the county a motion will be made to said court for a judgment against such collector and his sureties,for all sums of money due from him to the state or county, as the case may be, at time of making such motion, together with the penalty aforesaid. The circuit courts of this state are hereby vested with power and jurisdiction to hear and determine all such motions and proceedings at the first term at which such motions may be made. The judgments rendered by the court under the provisions of this section shall have the same force and effect, and be enforced in the same manner, that other judgments in the circuit courts of this state are enforced. Proceedings under this section shall be in the name of the state or county, as the case may be. Such notice may be served by any constable, coroner, or other person who would be a competent witness, and shall be served at least five days before the motion is made. The court shall have power to compel the production of all books, papers, records and other documents in the possession of the collector or others, to be used as evidence in the cause."

Section 9927, Revised Statutes Missouri 1929, requires every county collector, on or before the 5th day of each month, to file with the county clerk a detailed statement verified by affidavit of all state, county, school, road and municipal taxes and of all licenses by him collected

during the preceding month and to pay the same, less his commissions, on or before the 15th day of the month into the state and county treasuries, respectively. Said section reads:

> "Every county collector and ex officio county collector, except in the city of St.Louis,shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector."

In the case of State v. Sanderson 77 S. W. (2d) l. c. 96, the Court, in construing the above and other pertinent sections, said:

> "It will be noted that the section quoted refers to a failure of the collector to pay the amount due from him on settlement. What is meant by settlement can be easily understood when sections 9918 to 9922, inclusive, are read (Mo. St.Ann. Secs.9918 to 9922,pp.7969,7970). In brief, these sections provide that the collector shall make an annual settlement with the county court. The county court is required, before approving a

> settlement, to make special inquiry and be fully satisfied that the collector has used due diligence in making collections. It is also required to fully examine the settlement offered by the collector before approving same. If the settlement be approved, the law requires it to be made a matter of record and a copy thereof certified to the state auditor. The collector is also required, under Section 9927 (Mo. St. Ann. sec. 9927, p. 7972), to make monthly reports to the county court of all collections made and to pay the amounts due the state and county on or before the fifteenth of each month. It will be noted that the county clerk is required to forward a certified copy of these reports to the state auditor."

As to your second question as to whether the collector is liable for ten per cent each month until the balance found due on the annual settlement is paid, we think the case of State v. Sanderson, supra, is decisive.

In the above case, at l. c. page 97, the Court said:

> "The record in this case is silent on the question, but we may presume that the county court of Pike county performed its statutory duty and fully examined the settlements offered by the collector before approving them. We may infer from the record that Sanderson paid in full all amounts due as shown by those settlements. If this were a case where the collector failed to pay the full amount shown to be due from him by monthly reports or

annual settlements, or if this were a case where the collector had intentionally filed false returns and settlements and withheld funds belonging to the state and county, a statutory penalty could be rightly imposed. It is, however, a cardinal rule of law that penal statutes must be strictly construed. This, of course, is a penal statute. It would require a most liberal construction of the statute to impose the penalty sought in this case upon a collector, under the circumstances as shown by the record."

* *

"Under the authorities cited and the statute, we hold that in this case the only theory upon which the collector could be held liable is that due to a mistake of fact and not of law the collector failed to pay the county and state all sums due them. No section of the revenue act imposes a penalty upon a collector for an honest mistake of this kind. The wording of section 9933 clearly indicates that the penalty therein prescribed cannot be imposed in this case."

CONCLUSION

In view of all the above, it is the opinion of this department that a county collector should pay to the county treasurer all state, county, school, road and municipal taxes and all licenses by him collected during the preceding month, less his commissions, on or before the 15th day of each month, and, if, on annual settlement with the county, there is found to be any money due the county it is his duty to pay the amount found due.

It is our further opinion that if the collector fails to pay the amount shown to be due from him by the annual settlement, or if the collector intentionally makes a false settlement and withholds funds belonging to the county, he will be liable for the statutory penalty of ten per cent a month on the amount wrongfully withheld, to be computed from the time the amount ought to have been paid until actual payment.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED@

JOHN W. HOFFMAN, Jr.
(Acting)Attorney General

JET:LC

VOTING: Members of Citizens Conservation and transient camps are entitled to vote in county and state elections, both as resident voters.

FILED
13

July 31, 1936

7-31

Honorable Wilbur C. Buford
Game and Fish Commissioner
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated July 23rd, is as follows:

"Please render an opinion as to whether or not the members of the various C. C. C. Camps and Transient Camps over the state are entitled to vote in the respective counties in which those camps are located, at the coming primary and general election this summer and fall,and if they are entitled to vote, must they vote absentee ballots when they have been a resident of the state for one year and a resident of the camp for sixty days, and have declared themselves to be residents of the county in which the camp is located?"

Section 2, Article VIII of the Missouri Constitution was adopted February 26, 1924, and provides as follows:

"All citizens of the United States, including occupants of soldiers' and sailor's homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person

while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting.

Section 10178 R. S. Mo. 1929, provides as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people; First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides; Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

The Constitution and Statute above set out does not refer to those persons who work in Citizens Conservation Camps, and trasient camps, and the very fact that these camps are composed of citizens, would indicate that they are to be treated ascitizens of the United States, irrespective of their duties relating to the camp to which they belong.

It is the opinion of this office that one who belongs to a Citizens Conservation Camp or transient camp, is not disfranchised as a voting citizen, and if said elector has resided in this State for one year and in the county, city or town sixty days immediately preceding the election to which he offers to vote, he shall be considered an elector, and as such is entitled to vote as any other elector when presenting himself to the polls for that purpose.

II.

Residence is a prerequisite to voting in this State. The Attorney General's office takes notice that the personnel of a Citizens Conservation Camp and transient camp is usually made up of citizens, who, before entering the camp, resided in many states in the Union. This question may present itself: Is this personnel made up only of temporary residents in this State and County, at all events, not entitled to vote in Missouri, because of the non-permanency of their camp's location?

The fact that a camp may be moved at pleasure does not mean that the personnel must follow the camp. One who is a member of a Conservation Camp or Transient Camp is not on the same plane as an inmate in a poorhouse, or a convict in the penitentiary, and hence disqualified as a citizen and a voter. These citizens are not incarcerated in a Citizens Conservation Camp or Transient Camp. They are there by choice. They leave by choice, and they retain all their civil rights while attending camp. To reason otherwise would defeat the very purpose for which these camps were created by our President. They can sever their relations with the camp life on their own volition. Their membership and domicile within a Citizens Conservation Camp, or transient camp, without additional facts, is of minor importance in determining the question of their residence when qualifying them as electors for voting, under the Missouri Constitution and Statutes.

Webster's dictionary defines the verb "reside" as used in the Constitution and Statutes thus:

"1. To take up one's abode or station.
2. To dwell permanently or for a considerable time; to have a settled abode for a time; to have one's residence or domicile; specif., to be in residence, as the incumbent of a benefice."

Webster also gives as synonyms for the verb "reside";

"Live; dwell; abode; sojourn; stay and remain."

Section 655 R. S. Mo. 1929, provides in part as follows, and defines residence in this State in its seventeenth point thus:

"* * * *; seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively;* * * *"

The above statutory definition is not to be interpreted to mean that only persons falling within its provisions are to be considered as legal residents of this State when qualifying as voters. True, those persons which fall within the statutory definition are residents, ipso facto, for the purpose of voting. On the other hand the word "reside" as used in the Constitution and Statutes relating to voting has no fixed meaning applicable alike in all cases, but the intention of the party is a large factor in determining residence.

Our Supreme Court said in Green v. Beckwith, 38 Mo. 384, l. c. 387;

"A man's residence, like his domicile, or usual place of abode, means his home, to and from which he goes and returns, daily, weekly, or habitually, from his ordinary avocations and business, wherever carried on."

In the case of State ex rel. v. Smith, 64 App. 313, l. c. 319, the Court said:

"The term 'residence' has no fixed meaning applicable alike to all cases. It must be understood differently, according

> to a number of varied conditions. In some instances it is regarded as synonymous with 'domicile,' but they are not, in all cases, to be treated as convertible terms. It is said that domicile is residence combined withe intention. It has been well defined to be residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. A man can have but one domicile, for one and the same purpose, at any one time, though he may have numerous places of residence. His place of residence may be, and most generally is, his place of domicile, but it obviously is not by any means necessarily so, for no length of residence, without the intention of remaining, will constitute domicile."

Judge Cooley in his Constitutional Limitations, volume 8, page 1365 to 1367 says:

> "A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom. The words 'inhabitant' 'citizen,' and 'resident', as employed in different constitutions to define the qualifications of electors, means substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home. Every person at all times must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place. One's residence is where he has an established home; the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It has been held that a student in an institution of learning, who has residence there for the purpose of instruction, may vote at such place provided he is emancipated from his father's family and for the time has no home elsewhere. * * * * * Temporary absense from

one's home, with continuous intention to return will not deprive one of his residence, even though it extend through a series of years."

CONCLUSION.

It is the opinion of this office that one who belongs to a Citizens Conservation Camp or Transient Camp is not disfranchised as a voting citizen. It is our further opinion that as far as residence is considered in the qualifications of voters, those members in a Citizens Conservation Camp or Transient Camp, residing in a camp located in this State and your County, may become qualified electors and voters in your State and County elections. The fact that one is a member of a camp is not of itself conclusive evidence as to temporary residence, disqualifying him as a voter. Residence for the purpose of voting, in all cases is largely a matter of intention on the part of the elector. The elector's intention as to residence can be determined by his overt acts and his declarations on the matter. When once an elector has fixed his habitation for the required period of time within your jurisdiction, with no present intention of moving, then he is a qualified voter in your jurisdiction, as far as residence is concerned, even though he be a member and living at a Conservation Camp or Transient Camp.

Those electors who have always been a resident of this State but have not shown any intention of being but temporary residents of your county may vote an absentee ballot within this State and your county, the ballot to be voted and transmitted as the absentee ballot of any other qualified voter. On the other hand, where a member of a C. C. C. Camp or Transient Camp, of proper age, has resided in the State of Missouri for one year and in a county for sixty days, even as a member of a Citizens Conservation Camp or Transient Camp during his county residence, and has declared himself to the Judges of election, to be a resident of the camp in the county in which the camp is located is entntled to vote in said County, State and National election as a resident voter, and is a qualified elector for that purpose. He cannot legally be disfranchised or forced to vote an absentee ballot under such circumstances.

Respectfully submitted

WM. ORR SAWYERS,
Assistant Attorney General

APPROVED:

JOHN W HOFFMAN, Jr. (Acting) Attorney General

LANDS:) Legislation is necessary in order for the State
STATE FORESTS:) of Missouri to obtain benefits of the Fulmer Act;
) until legislation is enacted the State of Missouri
) cannot cooperate with the Federal Government.

August 25, 1936.

FILED
13

Honorable Wilbur C. Buford
Commissioner
Game and Fish Department
Jefferson City, Missouri

Dear Mr. Buford:

We are in receipt of your communication requesting our opinion as to the authority of your Department to cooperate under the Fulmer Act relating to State forests.

The so-called Fulmer Act was enacted by the Congress of the United States for the purpose of acquiring, developing and administering and managing State forests and coordinating State and Federal activities in order to carry out a national program of forest land management. The Act is found in United States Code Annotated, Vol. 16, 1935 Cumulative Annual Pocket Part, pages 119 to 121. Said Act consists of Sections 567a, 567b and 567c. Section 567a provides in part as follows:

> "For the purpose of stimulating the acquisition, development and proper administration and management of State forests and of insuring coordinated effort by Federal and State agencies in carrying out a comprehensive national program of forest-land management, the Secretary of Agriculture is hereby authorized to enter into cooperative agreements with appropriate officials of any State or States for acquiring in the name of the United States, by purchase or otherwise, such forest lands within the cooperating State as in his judgment the State is adequately prepared to administer, develop, and manage as State forests in accordance

with the provisions of this Section and Section 567b and with such other terms not inconsistent therewith as he shall prescribe, * * * * *"

Section 567b relates to the "Conditions and requirements for cooperation in acquisition and management of state forests" and provides in part as follows:

"No cooperative agreement shall be entered into or continued in force under the authority of Section 567a * * * * * * unless the State concerned, as a consideration for the benefits extended to it thereunder, complies in a manner satisfactory to the Secretary of Agriculture with the following conditions and requirements which shall constitute a part of every such agreement.

* * * * * * *

"(b) * * * the State shall provide for the employment of a State forester, who shall be a trained forester of recognized standing.

* * * * * * *

"(h) During the period any cooperative agreement made under this section and Section 567a and 567c remains in force, one-half of the gross proceeds from all lands covered by said agreement and to which the United States holds title shall be paid by the State to the United States and covered into the Treasury. All such payments shall be credited to the purchase price the State is to pay the United States for said land, such purchase price to be an amount equal to the total sum expended by the United States in acquiring said lands. Upon payments of the full purchase price, either as herein provided or otherwise, title to said lands shall be transferred from the Federal Government to the State, and the Secretary of

Agriculture is authorized to take such action and incur such expenditures, as may be necessary to effectuate such transfer."

The State of Missouri in 1935 gave its consent to the United States to acquire Missouri land for certain purposes by statutory enactment, namely, Section 11072, Laws of Missouri, 1935, page 291. Said section, with the emergency clause, reads as follows:

"The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses.

"The government of the United States being willing to acquire additional lands for purposes of reforestation and prevention of soil erosion and to aid in the nation-wide unemployment by establishing forest camps to carry on the work of reforestation, thereby creating healthful and remunerative employment for thousands of men now idle and unable to support themselves and their dependents and it being immediately necessary to immediately promote the welfare of the citizens of the State and immediately necessary for the preservation of the public health, peace and safety that the unemployment calamity be immediately relieved in all possible ways, therefore an emergency is hereby declared to exist within the meaning of the Constitution of this State and this act shall take effect and be in full force from and after its passage and approval of the Governor of Missouri."

We have carefully examined the statutes of Missouri and we do not find any legislation which would permit cooperation bythe State of Missouri with the Secretary of Agriculture in order to effectuate the purposes of the Fulmer Act. The above section (11072) of our law merely provides for the acquisition of land by the United States. Chapter 43, R. S. Mo. 1929, does provide, however, for a Fish and Game Department, and Section 8215 of said chapter authorizes the State Game and Fish Commissioner to locate, build and maintain suitable fish hatcheries. Section 8220 of the same chapter authorizes the "purchasing, improving and maintaining for the State suitable real estate for public parks, for the recreation of the people of Missouri" and authorizes the Fish and Game Commissioner, the Governor, and the Attorney-General to contract for and purchase real estate, the title of which is to be in the State of Missouri, for the use as public parks. Section 8221 authorizes the State Game and Fish Commissioner to establish and maintain auxiliary game refuges for the protection and propagation of game. Nowhere in said chapter, however, is it provided or authority given to the State Game and Fish Commissioner to enter into a cooperative agreement with the Secretary of Agriculture to administer, develop and manage State forests.

Absent specific legislation, it is our opinion that your Department does not have legal authority to cooperate under the Fulmer Act.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

SEARCH WARRANTS: When same may be obtained.

9-9

September 7, 1936.

FILED
13

Hon. W. C. Buford,
Commissioner,
Game & Fish Department,
Jefferson City, Missouri.

Dear Sir:

This department acknowledges your letter and enclosure of September 1, 1936, wherein a request is made for an opinion on the following facts:

> "There was 2 Deer killed near Centerville some time back, and Mont Parker, and Everett Mann were charged with having killed them. One Deer was a Doe, and the other a Buck.
>
> "On last Tuesday the parties had a Preliminary hearing before C. M. Hiltbridle, Justice of Peace, and he failed to bind them over.
>
> "John R. Johnson assisted Joe Huett in this matter, and they both tell me that they had substantial evidence to warrant the Justice to bind them over, however the Justice failed to do this.
>
> "The case tried was for killing the Doe. There is the same kind of a case against these parties for killing the Buck.
>
> "I have advised them and the National Forest Authorities to let this matter rest, and take the Buck case up before a Grand Jury.
>
> "I wish you would get an opinion from the Attorney-General as to whether or not a Search Warrant can be obtained against

> the two parties charged, to get hold of 2 Guns they still have, and which the State thinks were used to kill these Deer."

Section 11 of Article II of the Constitution of Missouri provides that the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, thus:

> "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Section 23 of Article II of the Constitution of Missouri provides, in part, that no person shall be compelled to testify against himself in a criminal cause, thus:

> "That no person shall be compelled to testify against himself in a criminal cause, * * *."

As above indicated, the Constitution prohibits an unreasonable search, and the court in the case of State v. Owens, 302 Mo. 348, l. c. 357, in determining what was unreasonable, said:

> "While the Fourth and Fifth Amendments to the Federal Constitution are not involved here, Sections 11 and 23, Article II of the Constitution of Missouri, are almost identical in purport and in language with those amendments, and the construction of them by the United States courts is important authority for us in construing the like sections of our State Constitution. Many cases of prosecutions for the violation of prohibition laws lately have received consideration by courts of various states with reference to the production of evidence obtained by illegal search of the person or the premises of the defendant, and these will be noticed.

> "Whether a search is legal or illegal is not always determined by the presence or absence of a search warrant. The Constitution protects against an unreasonable search. A search may be unreasonable when made by an officer with a valid search warrant in his hands, or a search may be reasonable and entirely within the rights of an officer when he has no search warrant. Whether or not a search is reasonable is a judicial question. It is not within the power of the Legislature to enact a statute which will permit an unreasonable search. (People v. Milone, 195 N. Y. Supp. 488; People v. Case, 190 N. W. (Mich.) 289; United States v. Rembert, 284 Fed. 996; Lowry v. Rainwater, 70 Mo. 152, l. c. 158-159.) In this connection several cases turn upon the alleged consent of the party to be searched. We think such cases usually strain a point to justify the search. If an officer appears at a person's home, and in his official character demands the privilege of searching the premises, the owner of the premises who yields peaceably and silently to the official demand is as much under constraint as if he had forcibly resisted official interference."

The same court cites and discusses the following United States Supreme Court case, thus:

> "The rule is general that private papers, or property possessing evidential value only, obtained by government officers by means of illegal search, are not admissible in evidence against the person affected, whose premises were searched. This is the rule of the United States Supreme Court, and is followed almost universally by the inferior Federal courts and State appellate courts. This rule applies whether the evidence is procured by compelling the defendant to produce evidence against himself or whether it is discovered by means of an illegal search. * * * *

> "The Attorney-General in his oral argument in Division admitted the correctness of the rule, but claimed it had no application here, because in this case the property taken was contraband and therefore not property at all; that defendant having no right to it as property could not ask to have the evidence suppressed. That last presents the precise question to be determined in this case.
>
> "We will first consider cases arising in the United States Supreme Court. In Boyd v. United States, 116 U. S. 616, the defendant was charged with evading import duty on plate glass shipped into New York, and an order was made by the district judge requiring the claimant of the property to produce the invoice of the glass. The Supreme Court thus stated the question presented, l. c. 622:
>
> "'Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his pro erty for alleged fraud against the revenue laws--is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the Fourth Amendment to the Constitution?'
>
> "The court held it was unreasonable, and that the proceeding was also contrary to the Fifth Amendment to the Constitution which provides a man shall not be compelled to furnish evidence against himself. According to many of the courts the latter reason was entirely sufficient without a determination that it was contrary to the Fourth Amendment in regard to search and seizure. It will be noticed a warrant for the search, a court order, did not make it lawful."

Section 17 of Article II of the Missouri Constitution grants citizens the right to bear arms, and provides in part:

> "That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; * * * *."

Again, in the case of State v. Richards, 334 Mo. 485, l. c. 494, the court in holding that a gun was not contraband and its possession unlawful per se, said:

> "So far as the record discloses the revolver and the sheep skin coat taken were the private property of appellant. It was not contraband and its possession was not unlawful per se."

The guns or property sought to be obtained in this case are not contraband and their possession in the homes of the persons sought to be charged is not unlawful per se. As we have pointed out, the Constitution specifically provides that citizens may keep arms for the defense of their person, home and property.

The presence of a search warrant would not make the search legal. A search or seizure of the guns would constitute a compulsory production of the men's private property to be used against them and an "unreasonable search and seizure" within the meaning of the Fourth Amendment of the United States Constitution and Section 11 of Article II of the Missouri Constitution.

It would also constitute compelling the men to give evidence against themselves, which in criminal cases is condemned in the Fifth Amendment to the United States Constitution, and Section 23 of Article II of the Missouri Constitution.

From the foregoing, we are of the opinion that a search warrant may not be obtained against the two persons charged for the purpose of obtaining the guns which the State believes killed the deer.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

TAXATION AND REVENUE:) Owner of land has two years in which to
DELINQUENT LAND SALES:) redeem; if last day falls on Sunday,
following Monday is in time.

November 17, 1936.

1118

FILED
13

Mr. B. P. Burnham
Collector of the Revenue
Iron County
Ironton, Missouri

Dear Mr. Burnham:

This is to acknowledge your letter of November 13, in which you request our opinion on the question therein submitted. Your letter is as follows:

> "We are up against a situation here relative to issuing a deed on a tax certificate, and the Collector Mr. Hall would like to have your opinion on the matter.
>
> "A party purchased a tax certificate on November 8th, 1934 and if you will note that November the 8th this year fell on Sunday so the morning of the 9th at nine o'clock A. M. the party that owned the land came in and tendered the money to redeem the land, contending that Sunday would not count as the date of expiration fell on Sunday therefore he could not redeem until the office opened on the morning of the ninth.
>
> "The man that holds the certificate contends that the owner of the land lost his right by not redeeming on or before the 8th the day of expiration of the date of the Certificate.
>
> "You will note that Sec. 9956a 1933 Session Acts says that 'may redeem the

> same at any time during the two years next ensuing' The question is when did the two years end on the 8th or the 9th in some instruments we find that Sunday does not count in others it does. What is your opinion on this matter."

Your question pertains to the sale of lands sold for delinquent taxes under the provisions of Laws of Missouri, 1933, at page 425 et seq. Section 9952a of said laws provides in part as follows:

> "All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, * * * * * *."

Section 9952c provides in part as follows:

> "On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest and charges thereon * * * * * *."

Section 9956a sets forth in what manner and how lands sold as aforesaid may be redeemed, and provides in part:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: * * * * *"

It will therefore be seen that a person may redeem the land so sold during the two years next ensuing. We think

that the person so redeeming has two full years from the time of the sale.

You state in your letter that a party purchased a tax certificate on November 8, 1934, and that November 8 this year fell on Sunday. Your question is whether the person who desires to redeem may redeem same on Monday, November 9, following Sunday November 8. Two years would, under ordinary circumstances, be up on November 8.

The fourth subdivision of Section 655, R. S. Mo. 1929, 7 Missouri Ann. Stat. page 4899, relative to the construction of statutes, reads as follows:

> "fourth, the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded."

This part of Section 655, supra, has been construed many times by the courts of our State.

In the case of Keys v. Keys, 217 Mo., l. c. 64, following the case of Bank v. Williams, 46 Mo. 17, it is said:

> "the statute was construed to mean that if the last day for the performance of an act fell on Sunday, Sunday should be excluded from the computation of the time in which it might be done and that the act might be done on the succeeding Monday. Bank v. Williams has been approved and followed in Cattell v. The Dispatch Publishing Company, 88 Mo. 356; State v. Harris, 121 Mo. l. c. 447; Maloney v. Railroad, 122 Mo. l. c. 115; State v. May, 142 Mo. 135; and in Evans & Hollinger v. Railroad, 76 Mo. App. 468.'"

To the same effect is the case of Stutz v. Cameron, 254 Mo. l. c. 340.

In the case of The State ex rel. Bulger v. Southern, 278 Mo. 610, the court held that where the statute requires that

"the time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded," the last day if it be Sunday is not to be included in computing the time, but is to be excluded from the computation, and the time named ends on the following Monday and not on the preceding Saturday.

And in the case of Spring v. Giefing, 289 S. W. 827, the court said:

> "Where the last day within which to do an act falls upon Sunday, then the following Monday is within the time. Bank v. Williams, 46 Mo. 17; Keys v. Keys, 217 Mo. l. c. 64."

We think that the last mentioned statute and the cases cited above are applicable to the question asked in your letter. The person redeeming the land has two years to redeem and if the last statutory day for redemption falls on Sunday he may redeem on the following Monday.

It is, therefore, our opinion that under the facts, as stated in your letter, the land may be redeemed on Monday, November 9, 1936.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

CRH:EG

COUNTY COLLECTOR *
EX OFFICIO TREASURER:) In counties less than 40,000 inhabitants and not under township organization, collector must perform all duties on January 1, 1937, formerly required of county treasurer.

12-21

December 19, 1936.

FILED
13

Honorable N. Elmer Butler
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Will you please give me an opinion on the following:

"Is it compulsory that the Collector take over the office of the County Treasurer on January 1, 1937. In counties that come the consolidation law.

"If Collector is enjoined from taking over the office of Treasurer does he pay any money to the present Treasurer."

Stone County has a population of 11,614 inhabitants according to the last United States Decennial Census, and is not under township organization. Offficial Manual, State of Missouri, 1935-36.

In 1933 the 57th General Assembly abolished the office of county treasurer in counties such as Stone County by repealing Section 12130, R. S. Mo. 1929. In 1933 (Laws of Missouri, 1933, page 338, Section 12132a) the Legislature made it mandatory upon the collectors to act as "ex officio county treasurer" and provided that said county collectors should perform any and all duties then devolving upon the county collector and county treasurer. Section 12132a, supra reads as follows:

> "On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

From the above section it is seen that after the 31st day of December, 1936, there will be no office of county treasurer in Stone County. Consequently, no office being in existence no person could act as an officer either de facto or de jure. Ex parte Snyder, 64 Mo. 58.

While Section 12132a, supra, specifically prohibits additional remuneration of the county collector by virtue of him taking over the office and being ex officio treasurer, yet such fact would not be an excuse for the county collector to fail to perform the duties entailed by virtue of Section 12132a, supra. It is well settled that a public officer is

only entitled to fees if the statute gives them to him, and, failure of statute to provide for fees for services, the officer is required to perform the services and such has no claim on the State for compensation therefor. Gammon v. Lafayette County, 76 Mo. 675; Williams v. Chariton County, 85 Mo. 645; State ex rel. Chapman v. Walbridge, 153 Mo. 194.

If the county collector fails or refuses to comply with the provisions of Section 12132a, supra, in that he will not act and perform all the duties now devolving upon the county treasurer, such collector would be subject to ouster.

In Bakersfield News v. Ozark County, 92 S. W. (2d) 603, the Supreme Court of Missouri said (p. 605):

> "If a public officer fails to perform mandatory ministerial duties, he may be compelled to do so by mandamus. If he 'be guilty of any willful or fraudulent violation or neglect of any official duty' (Mo. St. Ann. Sec. 11202, p. 6143), he may be removed from office by the method provided in sections 11202-11209 R. S. 1929 (Mo. St. Ann. Secs. 11202-11209, pp. 6143-6146)"

From the above it is our opinion that it is compulsory and mandatory that the collector take over and assume and perform any and all duties now devolving upon the county treasurer. The time for taking over the duties by the collector as ex officio treasurer will be January 1, 1937.

In answer to your question, "If Collector is enjoined from taking over the office of Treasurer does he pay any money to the present Treasurer"? we respectfully decline to comment, as our opinion would be governed solely by the terms of the injunction, which we do not have before us. Suffice it to say that the collector would greatly jeopardize and prejudice the provisions of his bond even if he did comply with an injunction issued by the circuit court requiring him to pay

all moneys over to the present treasurer. We do not believe the court would issue such a decree.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH:EG

ELECTIONS: Sec. 10310, Laws of Mo. 1933, p. 228 is mandatory, and not directory in the counting of votes when it states that the same shall not be counted.

April 10, 1936.

H-16

FILED
14

Honorable George B. Calvin,
Washington, Missouri.

Dear Sir:

This department is in receipt of your letter of April 8, wherein you enclose a sample ballot and explain the method of voting in the city election in the City of Washington, and inquire as follows:

> " * * * * Some of the voters placed a cross in the Democratic circle and also in the Independent circle, in some of the wards the intent of the voter was interpreted as wishing to vote the Democratic ticket and for Mr. Rau, the Independent candidate for Mayor, since as you will note on the ballot there was no Democrat running for that office, and no other candidate except the candidate for Mayor running on the Independent ticket. In other wards the entire ballot was thrown out. This was enough to defeat our alderman, and I believe the Independent candidate for Mayor, who had the support of the Democratic Committee, since we were unable to get a candidate on our ticket.
>
> "I know it is not the proper way to vote, but as I cited above, I do not believe there can be the slightest doubt as to the intent of the voter, and the Democratic Committee and the Independent candidate have asked me to obtain at once an opinion as to whether the vote should be counted, which we contend it should be, as I stated before was counted in some wards. * * * * * "

The City of Washington, being a city of the third class, conducts its elections, we assume, pursuant to Section 6721, R.S. Mo. 1929, which is as follows:

> "A general election for the elective officers of each city of the third class shall be held on the first Tuesday in April after the organization of such city under the provisions of this article, and every two years thereafter, and all city elections shall be held under the provisions of the general election laws of the state: Provided, that all certificates of nomination and petitions therefor, as provided by the state election laws, shall be filed with the city clerk and not with any other officer, and all duties specified to be performed by the constable or sheriff in the state election laws shall be performed by the marshal in city elections; and all tickets for city elections shall be printed by the city and at the city's expense; and all duties heretofore performed by the county clerk with reference to city elections shall be performed by the city clerk. The polling places for all elections in such cities, and the judges therefor, shall be selected and specified by the respective city councils of such cities by resolution, ordinance or otherwise. The manner of making returns of such election shall be prescribed by ordinance. Any city organizing under the provisions of this article may elect a mayor and such other officers as may be necessary to carry this article into effect, who shall hold office until the second Tuesday in April thereafter, and until their successors are elected and qualified."

As the above section contains the clause "And all city elections shall be held under the provisions of the general election laws of the state", we assume that the procedure in the calling of the election, the notice, etc. was carried out according to the usual procedure in conformity with the general election laws.

The manner of voting is set forth in Sec. 10310, Laws of Mo. 1933, p. 228, as follows:

> "On receipt of his ballot, the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting booths so provided, and shall prepare his ballot for voting in the following manner: Should the voter desire to vote a 'straight' party ticket, he shall place a cross (x) mark in the circle immediately below the party name. If the voter desires to vote for one or more candidates on more than one party ticket, by voting what is commonly called a 'split' ticket, he may place a cross (x) mark in the circle immediately below one party name and mark cross (x) marks in the squares at the left of the names of candidates on other tickets for whom he wishes to vote. If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such cancelled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle. Where there are two or more candidates for like office in a group of cross (x) mark in the square to the left of a candidate's name, automatically votes against the candidate whose name appears within the same horizontal lines in the column under the circle in which appears the cross (x) mark unless the voter indicates another candidate to be voted against by drawing a line through such candidate name. All candidates of the party whose circle is marked shall be counted as voted for excepting where squares are crossed preceding the names of the candidates in other columns if two or more candidates for the same office are thus designated, neither shall be counted. If the cross (x) is not placed in the circle immediately below the party name at the head of the column, but does appear in the squares opposite the various candidates' names,

then only these names shall be counted for, and none other. A cross (x) mark is any line crossing any other line at any angle within the voting space, and no ballot shall be declared void because a cross (x) mark therein is irregular in form. It shall not be lawful to deface or tear a ballot in any manner nor to erase any printed name 'except as provided above in this section,' figure, word or letter therefrom, nor to erase any mark made thereon by such voter, nor inclose in the folded ballot any other paper or any article. If the voter deface or tear a ballot, or wrongly mark the name or make an erasure therein, he may obtain one additional ballot on returning to the ballot clerk the one so defaced or wrongly marked. A ballot placed in the ballot box without any marks shall not be counted. Ballots shall be counted only for the person for whom the marks are thereon are applicable; when a voter shall place a mark against two or more names for the same office, and only one candidate is to be chosen for the office none of the candidates shall be deemed to have been voted for and the ballots shall not be counted for either such candidate. Before leaving the booth the voter shall fold his ballot in such a manner as to conceal his marks thereon. He shall mark his ballot without undue delay. He shall then hand the ballot to the judge of election selected to take ballots, who shall number the ballot and deposit it in the ballot box. The voter shall quit and leave said enclosed place as soon as possible."

Therefore, the sample ballot which you enclosed, containing the cross (x) mark in the Democratic column and in the Independent column, would not conform with the above quoted section. In the Independent column there is only one person's name printed on the ballot--that of W.H. Rau, for Mayor, while in the Democratic column there is no candidate for Mayor, but names of candidates for the other offices, with the exception of City Attorney, and Treasurer, are printed therein.

We think Sec. 10310, supra, is mandatory--not directory--in its terms. It is definite as to what ballots shall be legal,

and prescribes no results if the voter does not follow the terms of the statute. We base this conclusion on the case of Horsefall v. School District, 143 Mo. App. l.c. 545-546, wherein the Court said:

> "The decisions of the Supreme Court in this state have not been altogether harmonious as to the effect of irregularities upon the result of an election, and we shall not attempt to review these cases, but we think it may now be said to be the established rule in this state, as it is generally in other jurisdictions, that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. Also, if the statute provides specifically that a ballot not in a prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute merely provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed their will. If they have, the election will be upheld, or the ballot counted as the case may be. (Bowers v. Smith, 111 Mo. 45, 20 S.W. 101; Hope v. Flentge, 140 Mo. 390, 41 S.W. 1002; Sanders v. Lacks, 142 Mo. 255, 43 S.W. 653; State ex rel. v. Roberts, 153 Mo. 112, 53 S.W. 520; McKay v. Minner, 154 Mo. 608, 55 S.W. 866; Hehl v. Guion, 155 Mo. 76, 55 S.W. 1024; State v. Swearingen, 128 Mo. App. 605, 107 S.W. 1)."

You will note from the above decision that the final test is whether or not the voter has been given an opportunity to express and has fairly expressed his will.

As further bearing on the question of the statute being mandatory in its terms, we call your attention to the case of Lankford v. Gebhart, 130 Mo. 621, wherein the Court said (l.c. 640):

> "One ballot voted for contestee contained the word 'yes' written under the name of one candidate for prosecuting attorney and the word 'no' written under the name of the other candidate for the same office. This ballot was rejected by the court.
>
> "It may be that under the mandatory requirements of section 4671, that ballot should not have been counted because of writing the words 'yes' and 'no' therein. When the statute requires that a ballot, on account of want of conformity to any particular provision of the law, shall not be counted, it is mandatory. As was said in Gumm v. Hubbard, supra, sec. 5493, (the same as section 4671) furnishes an absolute rule of evidence. It makes the ballot fraudulent without regard to intent, when it has thereon any writing or printing other than that specified. But, as we have seen, this section was repealed by the act of 1891, and no such prohibition is now contained in the statute.
>
> "The words written do not apply to the office of sheriff, which alone is in contest here. We can see no reason for rejecting the entire ballot for the reason that the vote for prosecuting attorney may be left in doubt. Atkeson v. Lay, 115 Mo. 538. We are of the opinion that this vote should have been counted for contestee."

A similar situation, although not identical with the facts you present, arose in the case of Bradley v. Cox, 271 Mo. 438. In that case it was said:

> "Bradley was the Democratic nominee. There were 1311 ballots cast on which the name of Johnson, who was not the nominee of any party, was printed. These ballots were headed 'Democratic Party', were prepared by the county clerk, and handed by the judges of election to the voters as they came to vote, and the names of the Democratic nominees for all other officers were printed thereon. The ballots were returned by the voters without erasing the printed name of Johnson and without writing in the name of Bradley or of any other person, and without any attempt to change them. The law required Bradley's name to be printed on the ballots and prohibited the voters from writing his name thereon and from providing other ballots for themselves. Held, that the ballots must be counted for Bradley. This conclusion is enforced by the statutes themselves."

And further bearing on the question of the intention of the voter, the Court said:

> "The provision of the Constitution that all elections shall be by ballot does not preclude the counting of votes for the party nominee although on their face the ballots show they were cast for a man whose name was unlawfully printed on them. That provision is intended principally to secure secrecy, and any manner of voting that shows the voter's choice and preserves secrecy is voting by ballot; and, besides, the votes were by ballot."

In the case of Yowell v. Mace, 221 Mo. App., l.c. 91-92, the Court, in speaking of the form of the ballot and the result, if the ballot is not voted in conformity with the statute, said:

"The statute nowhere prescribes what shall be the result of failure to use the form of ballot provided therein. That being the situation the failure of the county clerk to provide a ballot identical in form with the statutory ballot would not necessarily invalidate the election. The present rule in this State indicates a liberal attitude on such questions and is thus stated, 'Where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; but where it merely provides that certain ballots shall be used, and does not prescribe what results shall follow if they are not used, the statute is directory, and the test as to the legality of the ballot is whether or not the voters were afforded an opportunity to express, and that they did fairly express their will.' (State ex rel. Memphis v. Hackman, 202 S.W. 14, 273 Mo. 670.)

"In another case where an irregular ballot was used in an election on township organization, the following test was promulgated: 'If it appears that no substantial right depends upon a compliance with the statutory requirement and no injury can result from ignoring it, and the other purpose of the Legislature can be accomplished in a manner other than that prescribed and substantially the same result obtained, then the statute will be regarded as directory; but if not so, it will be mandatory.

"To the same effect are State ex rel. Barrett v. Imhoff, 291 Mo. l.c. 621, 238 S.W. 122; Nance v. Kearby, 251 Mo. 374; 158 S.W. 629; Applegate v. Eagan, 74 Mo. 258, and other cases. From these authorities it is quite clear that the statute here involved is directory merely and unless the ballot be in such form as to prevent a free expression of the voter's will, it should not be cause for holding the election invalid.

Under the facts with which we are confronted there is no reason to believe the voter could have been misled or confused by the ballot used. The fact that the ballot provided a square before each proposition to be voted upon was not unusual and it was a method of voting with which each voter, in Missouri, may be presumed to be familiar since it is used almost uniformly, under our law, when voting upon candidates or upon propositions submitted to the voter. While the voter might also cross out the proposition he did not desire to vote, which the evidence shows was done, that should not invalidate the ballot under the rule that if the will of the voter can be determined from his ballot, and no law is infracted, the ballot should be counted. (Right v. Marquis, 255 S.W. 637) Some weight may also be given to the fact that in the township where one of plaintiffs resided, composed of Edgar Springs and Yancy voting precincts, there was a total vote for presidential electors 367. The vote in the precincts was 21 for and 332 against the stock law. It certainly cannot be said there was any misunderstanding or confusion in the minds of the voters in that township. The total vote in the county was 1755 for and 1505 against out of a total vote for presidential electors amounting to 5500. This indicates 1240 who voted at the election failed to vote on the stock law proposition. The large portion of those who failed to vote on the proposition resided in the cities of Rolla and St. James where, it may be presumed, the voters were not particularly interested in the outcome of the stock law election. There is no charge of fraud or mistake and no evidence in this case to indicate the voter was confused or misled by the ballot used. We are, therefore, of the opinion that the election was valid and the judgment should be affirmed."

CONCLUSION

As the precise question you present has never been before the courts of this state, we are loathe to pass any legal opinion

on the validity of counting such ballots, but we have attempted herein to cite the authorities which bear on the question and which will aid you in arriving at a conclusion as to the validity or invalidity of the ballot submitted.

We agree with you that one could arrive at a reasonable inference from the ballot submitted that it was the intention of the voter, by placing an X mark under the Independent Party emblem , W.H. Rau being the only person whose name appears on said Independent Ticket, to vote for Mr. Rau, and by placing an X mark under the Democratic emblem, intended to vote for the remainder of the officers on said Democratic Ticket. However, even though the intention of the voter may be reasonably gleaned from the submitted sample ballot, the decisions hereinabove quoted state that when the statute does not contain the results, if the prescribed form is not carried out, the statute is declared directory and not mandatory.

Bearing further in mind that Sec. 10310, supra, states instances when the ballot shall be lawful or unlawful, we call your attention to the sentence: "ballots shall be counted only for the persons for whom the marks thereon are applicable; when the voter shall place a mark against two or more names for the same office and only one candidate is to be chosen for the office, none of the candidates shall be deemed to have been voted for and the ballots shall not be counted for either such candidate". It is our opinion from the above terms that in the instance which you present, the terms of Section 10310 are mandatory and not directory.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

MOTOR VEHICLES--LICENSE TAX: Employees of Federal instrumentalities are not required to have a Missouri certificate as a registered operator of an automobile.

January 3, 1936.

1-4

FILED
15

Honorable B. M. Casteel, Supt.
State Highway Patrol
Jefferson City, Missouri

Dear Colonel:

This is to acknowledge your letter relative to the request of Captain Thomas L. Leigh of Troop C. Kirkwood, Missouri. Captain Leigh's letter is quite lengthy and we refrain from quoting same.

The facts presented show that an employee of the Federal Land Bank, an instrumentality of the Government, was arrested for not being a registered operator within the provisions of Section 7766 R. S. Mo. 1929, and the narrow question for determination being whether or not said employee is subject to the provisions of the aforesaid Statute. It is our opinion that an employee of the Federal Land Bank, when driving an automobile belonging to said Federal Land Bank, and on business for the Federal Land Bank, is not required to have a certificate as a registered operator, neither may the State impose a condition requiring him to become a registered operator. In other words said employee is not amenable to the provisions of Section 7766 R. S. Mo. 1929.

The Federal Land Bank is an instrumentality of the United States. See Federal Land Bank of Columbia v. State Highway (S. C. 1934) 173 S. E. 284.

The Supreme Court of the United States, speaking through Mr. Justice Holmes, in Johnson v. State of Maryland 254 U. S. 51, upon facts analogous to the present facts, said the following:

> "It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee

> for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct: it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed."

Captain Leigh in his letter says the following:

> "In this connection I would refer the Attorney General to his own opinion of April 18, 1933, on the question of whether or not a privately owned truck hauling mail under contract is required to have a state license."

The opinion referred to by Captain Leigh held that an automobile privately owned and used under contract with the Government to haul mail must have a State license. However, it is to be kept in mind that there is a vast difference between a privately owned truck used under a contract with the Government and an automobile owned by an instrumentality of the Government and used by an employee of the Government in the performance of his governmental duties. A contract hauler would not be an employee and therein lies the distinction.

Yours very truly

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

MOTOR VEHICLES: Definition of "registered operators" applied to facts in case of registered dealer employing irregular employe for purpose of driving cars.

2-27

February 26, 1936.

FILED
15

Colonel B. M. Casteel
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Casteel:

This is to acknowledge your letter dated February 21, 1936, wherein you enclosed a copy of a letter from Captain Lewis B. Howard and request our opinion on the question therein contained. Captain Howard's letter reads in part as follows:

> "A registered dealer in motor vehicles, located in Springfield, takes several men, not regularly employed by him, but under the supervision of a salesman, or other regular employee of the dealer, to St. Louis to drive new or used automobiles back to the dealer's place of business.
>
> "These irregular employees receive no compensation for the trip other than their meals, en route, and do not make regular trips.
>
> "In the opinion of the Attorney General, will it be necessary that drivers, as described, register either as Registered Operators or Chauffeurs, as defined in the Motor Vehicle Law."

On December 27, 1933, this Department rendered an opinion to you wherein we said:

> "The Legislature seems to have had in mind laying out a scheme of legislation intending

> to throw about the traveling public all possible protection under all circumstances and to not only keep a check on these authorized to drive automobiles but to see that those who did drive motor vehicles had some sort of qualification for such service and this would apply, as to those required to be registered operators, whether driving a car in the course of his employment or merely as an incident to such employment."

Section 7765, R. S. Mo. 1929, requires chauffeurs to be registered, and Section 7766, R. S. Mo. 1929, requires operators to be registered. Section 7759, R. S. Mo. 1929, defines "Chauffeur" as follows:

> "An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employe operates a motor vehicle carrying passengers or property for hire."

"Registered operators" are also defined by Section 7759, supra, as follows:

> "An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

From the definition given of "chauffeur" it will be seen that the persons driving the motor vehicles in the manner you state, would not be chauffeurs. There is likewise doubt as to whether or not said persons are registered operators.

Whether or not a person is a registered operator within the meaning of the definition of the word depends upon the facts. Captain Howard's letter states that the persons who drive the motor vehicles are not regularly employed, but when driving the automobiles from St. Louis to the dealer's place of business such persons are employes for that purpose. No compensation is paid for the services thus rendered by said persons. Applying the definition then of "registered operators," it will be seen that said persons regularly drive motor venicles as an incident to their employment but the principal occupation of said persons is not the driving of said automobiles. As we gather from the facts stated, said persons are employes of the dealer and whenever new or used automobiles are to be driven that these same persons perform that work. We are cognizant of the fact that the definition of "registered operators" uses the words "who regularly operates a motor vehicle of another person," and we believe the Legislature intended the word "regularly" to be given the same definition as was given to the word "regularly" in Palle v. Industrial Commission (Utah), 7 Pac. (2d) 284, 289. We quote from Words & Phrases, 4th Series, page 347, as follows:

> "Term 'regularly employed' within the Workmens Compensation Act, does not mean continuously or occasionally, but connotes usually and systematically employed."

Thus, if said persons are usually and systematically chosen to drive used cars to the dealer from the City of St. Louis, said persons would, in our opinion, be within the definition of the words "registered operators." Whether a person is a registered operator within the definition of the term is a question of fact, and from the facts stated in your letter it is our opinion that said persons would be registered operators within the definition, as defined by Section 7759, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

TAXATION: Personal property shall be assessed in the county of the owner's residence.

April 29, 1936. 4-29

FILED 15

Hon. W. T. Carter
County Assessor
Carter County
Van Buren, Missouri

Dear Sir:

Your request for an opinion from this department, directed to the Honorable Forrest Smith, reads as follows:

> "I would like to have the Attorney General's opinion through your department relative to a specific case in jurisdiction and personal valuation.
>
> "Dr. Robert I. Davis who resides at Birch Tree, Shannon County, Missouri owns and has operated the Rose Cliff Hotel at Van Buren, Carter County, Missouri. The furniture and fixtures used in operating the hotel, as I take it, are permanently located in Van Buren. Which county is entitled to this personal valuation?

At common law, the well-recognized doctrine was that the situs of the personal property of every description, wherever it is actually kept or located, is subject to taxation at the domicile of the owner. (26 R. C. L. page 273). It is now becoming universally an accepted rule that personal property is taxed at the domicile of the owner.

In the case of State v. Gehner, 8 S. W. (2d) l.c. 1059, the Court said:

> "The principle applicable at this point appears in 'mobilia personam sequuntur.' This principle, applied to the question under consideration, means that personal property has its situs for the purpose of taxation at the domicile of the owner. *****"

Your attention is directed to Section 9745, R. S. Mo. 1929, relating to personal property being assessed in the county of the owner's residence. Said section reads as follows:

> "All personal property of whatever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 9763; and all notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides; and the owner, in listing, shall specifically state in what county, state or territory it is situate or held.****"

Section 9763, R. S. Mo. 1929, as mentioned in the above section, is not apropos in the instant matter and therefore I do not deem it necessary to discuss the exception as mentioned.

In the case of State ex rel. vs. Pearson, 273 Mo. l.c. 78, the Supreme Court, in commenting on Section 9745, supra, said:

> "This provision is a sweeping one so far as it establishes the doctrine that personal property, tangible as well as intangible, follows the owner for purposes of taxation.***"

CONCLUSION.

In light of the above, it is the opinion of this department that the personal property of any person situated outside of the county wherein that person resides shall be assessed and taxed at the place of the domicile of said person.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

JUSTICES' COURTS: If Justice designates sheriff to serve process and includes same in his minutes, sheriff has power to do so.

May 2, 1936. 5-8

FILED 15

Mr. T. O. Carver,
Prosecuting Attorney,
Pulaski County,
Waynesville, Missouri.

Dear Sir:

This department is in receipt of your letter of April 9 wherein you make the following inquiry:

> "A controversy has arisen in this county between a Justice of the Peace and a Constable.
>
> "The Justice of the Peace gives all the Justice Court work, such as summons and other writs, to a Deputy Sheriff for serving.
>
> "The Constable claims that he is ready and willing to serve all papers in the Justice Court and that he is entitled to the work.
>
> "Will you kindly advise me if the Justice of the Peace has the right to ignore the Constable and give the work to the Deputy Sheriff?"

Section 2193, R.S. Mo. 1929 relating to justice courts and service of process is as follows:

> "In all cases not otherwise specially provided for, the process shall be a summons, and every summons shall be directed to the constable of the township in which the justice who granted the same resides, or in which the

defendant or one of the defendants resides, except where it is otherwise specially provided and shall command him to summons the defendant or defendants to appear before the justice who issued the same at a time and place named in the summons not less than ten nor more than thirty days from the date thereof, to answer the complaint of the plaintiff, stating also the nature of the suit and the sum demanded."

Section 2194, R.S. Mo. 1929 states:

"On each summons the justice shall indorse the amount of the plaintiff's demand, with the costs that have accrued; and if the defendant shall pay to the officer serving the summons the amount claimed and costs, the summons shall be returned as satisfied, and the suit shall thereupon be dismissed by the justice. But the failure of the justice to so indorse such summons shall in nowise affect the same or any service or proceeding in the case."

Section 2197, R.S. Mo. 1929 provides:

"Every justice issuing any process authorized by this article, upon being satisfied that such process will not be executed for want of an officer to be had in time to execute the same, or in all cases where the constable is a party to the pending suit or is otherwise interested in the result thereof, may empower any suitable person, not being a party to the suit, to execute the same, by indorsement upon such process to the following effect: 'At the request and risk of the plaintiff, I authorize _____ to execute this writ. E.F., Justice of the Peace.' And the person so empowered shall thereupon possess all the authority of a constable in relation to the execution of such

> process, and shall be subject to the same obligations, and shall receive the same fees for his services."

Section 2183 relates to the manner of commencing suits. All of the above sections tend to indicate that the constable is to serve process in his township. However, it has been held that the powers and duties of a constable are co-extensive with those of the sheriff, as was said in the case of Huhn v. Lang, 122 Mo. l.c. 606:

> "It becomes unnecessary to pass upon the other contentions that Kingsbury had no right to turn over the Justice's execution to Clary, his successor. The statute provides that in such case a sheriff shall turn over all unexecuted writs to his suceessor. Revised Statutes, 1889, sec. 4958. The duties and powers of the constable within the jurisdiction of a justice are identical with those of a sheriff, and the same reasons exist why the unexecuted writs in his hands should be turned over to his successor as in the case of a sheriff. In Vermont and Oregon the word 'sheriff' has been treated in similar statutes as generic, and broad enough to include constables. Winchell v. Pond, 19 Vt. 198; Hume v. Morris, 5 Oregon, 478."

In the case of Stegall v. Pigment & Chemical Co., 150 Mo. App. 251, with reference to private persons deputized to serve process, the Court said (l.c. 285):

> "It is said in the case of Huhn v. Lang, 122 Mo. 600, 27 S.W. 345, that the powers and duties of constables within the jurisdiction of the justice are identical with those of a sheriff, and so with reference to this special constable, while his

> returns, as we hold are not as conclusive, his powers and duties in the service of process which he has power under the statute to make, are as broad as those of the constable himself or of a sheriff."

In the case of State v. Taylor, 223 Mo. App. 883, it was held that the term "sheriff" may be construed to include "constables". The Court said (l.c. 888):

> "Now it will be observed that the statute (Sec. 3925, supra) refers only to the sheriff as the proper person to whom a surrender of the principal may be made by the bail. It is, therefore, contended by respondent that a surrender to the constable is not a compliance with the statute. The term sheriff may be construed as generic and sufficiently broad and comprehensive as to include constables."

CONCLUSION

While it is generally recognized that a constable is the chief process officer of a justice court and a sheriff is the chief process officer of the circuit court, yet, as stated in the above decisions, each officer's power is co-extensive with the other insofar as the township is concerned. A deputy sheriff has the same powers as the sheriff with rare exceptions. Hence, the question resolves itself into whether or not the sheriff can serve process in the justice court. We think if the justice designates the sheriff to serve the process and includes the same in his minutes, he has the authority and power to do so.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

COUNTY FINANCIAL STATEMENT: State Auditor prepares forms to be printed and approves financial statement as to form only; it is duty of person designated to prepare financial statement to show that same is correct; if financial statement is not included in preparing the budget, it may be paid out of Classes 5 or 6 or out of an ascertainable surplus in any of the other classes, or out of delinquent taxes.

May 7, 1936.

FILED
15

Mr. L.E. Cass,
Clerk of County Court,
Webster County,
Marshfield, Missouri.

Dear Sir:

This department is in receipt of your letter of April 18 wherein you make the following inquiry:

> " * * * I would like to have an opinion in regard to the financial statement. Does the State Auditor approve the financial statement as to form only? If so, upon whom does the responsibility rest if it isn't correct? In other words, is it the duty of the County Court to see that it is correct before they pay for the making and printing of said financial statement?
>
> "If a statement is made up which is incorrect and a challenge has been filed before the court as to its incorrectness, can it be legally paid for until the agent or agents who made it prove that it is correct? Just what steps should be taken in a case like this?
>
> "Also, there was nothing set up in the budget to pay for the making or printing of said financial statement. All of our anticipated revenue has been budgeted against and I am wondering after the other is cleared up how we are going to pay said claims if they are just and due. On account of there being nothing set apart in the budget, to pay for the making and

> and printing of the financial statement for this county, I have refused to issue warrants to pay same, as there is nothing provided in the budget to pay this, am I compelled to issue warrants to pay same?"

I

The State Auditor approves the financial statement as to form only

Under the provisions of Sec. 12166, Laws of Mo. 1933, page 356-357, it is the duty of the State Auditor to prepare sample forms, as follows:

> " * * * Within twelve months after the effective date of this act the State Auditor shall prepare sample forms for financial statements and shall mail the same to the county clerks of the several counties in this state, but failure of the auditor to supply such form shall not in anywise excuse any person from the performance of any duty imposed by this act. * * * "

The State Auditor does not vouch for the authenticity or correctness of a printed financial statement; he merely prepares the forms which should be followed in the printing of the same. Once the form is prepared, his duty ends, except as provided in Sec. 12166, he must notify the county treasurer of the receipt of the proof of publication.

II

It is the duty of the person designated to prepare the financial statement to show that the same is correct

Section 12165, passed by the Legislature in 1931 was repealed and a new section enacted by the Legislature of 1935 known as Section 12165 (Laws of Mo. 1935, page 317). Under the provisions of this section, the county court may designate some person to prepare a financial statement and the same must be

prepared in conformity with the provisions of Section 12165. If the county court does not designate some other person, it may designate the Clerk of the County Court. In either event the following certificate must be appended to the prepared statement:

> "I, ..., the duly authorized agent appointed by the county court of ..... county, State of Missouri, to prepare for publication the financial statement as required by section 12165 of the Revised Statutes of Missouri, 1929, hereby certify that I have diligently checked the records of said county and that the above and foregoing is a complete and correct statement of every item of information required in said section 12165 of the Revised Statutes of 1929 for the year ending December 19.... and especially have I checked every receipt from every source whatsoever and every disbursement of every kind and to whom and for what each such disbursement was made and that each such receipt and disbursement is accurately shown. (If for any reason complete and accurate information is not given the following shall be added to the certificate): Exceptions: the above report is incomplete because proper information was not available in the following records..... which are in the keeping of the following officer (or officers) The person designated to prepare the financial statement shall give in detail any incomplete data called for by this act."

From the above quoted certificate you will note that the person designated to prepare the statement must certify that the same is a correct statement of every item of information required by said section. The certificate also contains an exception if the report cannot be complete in every detail because of insufficient information.

If the person designated to make the statement certify falsely to any fact, the following provision is made to cover the same: (Laws, 1935, p. 319)

> "Any person falsely certifying to any fact covered by the certificate by this act required shall be liable on his bond therefor and upon conviction of so falsely certifying to any fact covered by such certificate shall be guilty of misdemeanor and punished by a fine of not less than two hundred dollars or more than one thousand dollars or by imprisonment in the county jail for not less than thirty days nor more than six months or by both such fine and imprisonment. Any person charged with the responsibility of preparing the financial report by this act required, who shall wilfully or knowingly make a false report of any record, shall, in addition to the penalty otherwise provided for in this act, be deemed guilty of felony."

In 1933, the Legislature made the following provision in regard to the person employed to prepare the financial statement of the county (Laws of Mo. 1933, p. 357):

> " * * * If the county court shall employ any person other than a bonded county officer to prepare the financial statement herein required, the county court shall require such person to give bond with good and sufficient sureties in the penal sum of one thousand dollars for the faithful performance of his duty. If any county officer or other person employed to prepare financial statement herein provided for shall fail, neglect, or refuse to, in any manner comply with the provisions of this act he shall, in addition to other penalties herein provided, be liable on his official bond for dereliction of duty."

As to whether the financial statement is correct or incorrect, is a question of fact. If the person who was designated to prepare the statement for a stipulated amount has properly prepared same and made the certificate, then he is entitled to his compensation.

If he has not properly prepared it, and we think the burden is on him to prove that the same was prepared in conformity with the statutes, then he has not fulfilled his contract and the county court would be justified in refusing to pay until the same is properly prepared.

III

With reference to the failure of the county court to include in the budget the cost of preparing the financial statement, an opinion was rendered by this department on March 21, 1935, to the Honorable J.T. Pinnell, Prosecuting Attorney, Pineville, Missouri, which, while not directly bearing on the question you ask, embodies the same principle, and we believe is applicable thereto; a copy of this opinion is herewith enclosed.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SCHOOL FUNDS: County court has right, absent fraud, to sell property acquired through foreclosure of school funds if such be the most advantageous to the school or schools interested therein.

October 24, 1936.

10-24

FILED
15

Honorable T. O. Carver
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Carver:

This is to acknowledge your letter as follows:

"Recently the County Court of this County caused to be foreclosed a number of School Fund Mortgages. A number of the mortgages had considerable accrued interest and in some cases the amount owing on principal and interest was more than the farms are now worth as the loans were made back when farm land commanded a better price and value.

"The county bought or bid in a number of farms for the amount owing and now have the farms on their hands, at a price greater than the value of the farms.

"They asked me if they had the right to sell the farms or any part of them for less than the amount they bid them in for, and to accept a substantial down payment and accept a mortgage on the balance owing on the selling price.

"I told them that in my opinion as financial agents of the County's business affairs that they had the right to do so so long as they obtained a fair and reasonable value for the farms based on present values. That

> the matter should be handled according to the dictates of good business judgment.
>
> "They asked me to obtain your official opinion on the matter so will you kindly furnish me with an opinion on the above matter at your earliest convenience."

The Supreme Court of Missouri in Veal v. Chariton County Court, 15 Mo. 412, 414, at an early date (1852), in speaking of the relationship of the county court to the school funds, said:

> "In relation to these funds, the county courts are trustees. They have no authority to dispose of the principal entrusted, or any of its interest, otherwise than is prescribed by law."

See, also: Montgomery County v. Auchley, 103 Mo. 492; Lafayette County v. Hixon, 69 Mo. 581.

Section 9248, R. S. Mo. 1929, places the management of school funds in the county courts of the respective counties. Section 9254, R. S. Mo. 1929, gives the county court authority to sell the property when the principal and interest, or any part thereof, remains unpaid. Section 9256, R. S. Mo. 1929, authorizes the county court to repossess the property by purchase, and in part provides as follows:

> "Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a

> bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, * * * * * The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; * * * * *."

From the above provisions of the statute it is to be noted that the county court has the power to protect school funds even to the extent of becoming the purchaser in the event of foreclosure.

Although the county may become the purchaser of property foreclosed under a school mortgage, yet it was never intended that the county should remain the owner of the property, as Section 9256, supra, specifically provides that the county court should dispose of the property as soon as practicable "and in the judgment of said court advantageous to the school or schools interested therein." However, the county court is not permitted to sell property acquired through foreclosure unless such sale would be advantageous to the schools. In other words, the county court could not use the means and method of satisfying a school fund mortgage by causing the property to be foreclosed and the full amount of the loan bid in order to acquire the property, and then turn around and sell the property at a much less figure back to the original owner of the property. In other words, county courts are trustees and if any fraud, collusion, or connivance on their part is evidenced in satisfying school mortgages by the procedure of foreclosing and bidding in the

property at the amount owing, and then reselling said property at a lower figure, said transaction would be voidable.

It is our opinion that, absent fraud, the county court has the power and authority under Section 9256, supra, to sell property acquired through foreclosure of school fund mortgages if such sale, in the judgment of the county court, is the most advantageous to the school or schools interested therein.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

Mo. STATE HIGHWAY PATROL: Designation of "sergeant" instead of "patrolman" is immaterial so long as compensation does not exceed that of patrolman; maximum employees of Patrol, exclusive of janitors and clerks are 10 captains and 115 patrolmen; Commission can increase salary of enlisted men who have served five years 10% or any other per cent if it does not exceed $2400 for captains and $1800 for patrolmen.

12-7

December 4, 1936.

FILED
15

Honorable Charles F. Carter,
Budget Commissioner,
Jefferson City, Mo.

Dear Sir;

This department is in receipt of your letter of November 28, wherein you request an opinion in regard to the budget of the Missouri State Highway Patrol. Your letter embodying the facts is as follows:

> "Will you please tell us if there is any provision in the law to pay sergeants a salary under the Patrol Act. I can find none.
>
> "What is the maximum number of employees they can employ under the Act outside of janitors and clerks? Can the Commission increase the pay of enlisted men who have served five years 10 per cent or any other per cent?"

I

The first paragraph of your letter relates to the question of sergeants receiving a salary under the Patrol Act. The Missouri State Highway Patrol was created by statute; its powers, activities and members are controlled and limited by the Act itself, as contained in Laws of Mo. 1931, p. 231, Secs. 1 to 20 inclusive. Therefore, if we are to determine the legality of a sergeant receiving compensation under the Act, it must be gleaned either specifically or impliedly from the terms of the statute.

Section 1, p. 231, contains the expression - "There is hereby created a force consisting of a Superintendent and other officers and patrolmen, as herein provided * * *" Section 2 of the Act contains the words "'members of the patrol' as used in this Act shall be deemed and taken to mean the Superintendent, captains and patrolmen of the Missouri state highway patrol."

Section 4, p. 232, provides in part that "The Superintendent shall appoint ten (10) captains, who shall have the same qualifications as the Superintendent. Captains shall receive salaries to be fixed by the Superintendent not to exceed the sum of two thousand four hundred ($2,400.00) dollars each per year * * * *"

Section 5, pertinent to the question, is as follows:

> "The superintendent shall appoint patrolmen not exceeding one hundred and fifteen (115) in number who shall receive salaries to be fixed by the superintendent not exceeding the sum of eighteen hundred ($1800.00) dollars each per year. Patrolmen shall be not less than twenty-four (24) years of age at the time of their appointment."

Section 7 of the Act, page 233, pertinent to the question, is as follows:

> "* * * All lawful rules and regulations of the superintendent shall be obeyed by the members of the patrol on pain of dismissal or such lighter punishment either by suspension, fine, reduction in rank or forfeiture of pay or otherwise as the superintendent may adjudge."

Section 8, referring to the administrative rules and regulations, gives the Superintendent authority to classify and rank captains and patrolmen - "All promotions to a higher grade or rank shall be made from the next lower grade."

Section 9 gives the Superintendent authority to furnish the members of the patrol with "such * * * insignia of office as the Superintendent may deem necessary."

Bearing in mind that by the terms of Section 4 the Superintendent is limited in his appointment to ten (10) captains, who are to receive not to exceed $2,400.00 per annum, and under Section 5 he is limited to the appointment of one hundred fifteen (115) patrolmen, whose salaries are not to exceed $1800.00 per annum, and while no mention is made of the appointment of sergeants, yet we are of the opinion that by virtue of the other sections herein quoted giving him the right to classify and rank captains and patrolmen and to reduce members of the patrol in rank or to promote them, the Superintendent may use such army designations as he may see fit in carrying out the intention of the Legislature in enacting the Act.

We assume that you are interested in the matter from the standpoint of the budget of the State Highway Patrol and that the rank of sergeant appears instead of captain or patrolman. We

are of the opinion that if the salary of "sergeant" does not exceed the compensation as provided for patrolman, then the designation "sergeant" instead of "patrolman" is immaterial in so far as the budget is concerned.

II

Your second question relates to the number of employees that may be employed under the Act exclusive of janitors and clerks.

Section 19 of the original Act (Laws of Mo. 1931, p. 236) was repealed and a new section enacted in lieu thereof (Laws of Mo. 1933, p. 409) and among other things the section provides that the State Highway Commission shall employ and assign to the Superintendent such clerical force and other subordinates as are necessary and shall furnish to the patrol office equipment, etc. Therefore, the number of clerks and other employees is left to the discretion of the State Highway Commission. However, as to the maximum number of employees, exclusive of janitors and clerks, we think the number of captains as set forth in Section 4, supra, and the number of patrolmen as set forth in Section 5, supra, are the maximum number that may be appointed by the Superintendent.

III

Your last question is to the effect - "Can the Commission increase the pay of enlisted men who have served five years 10 per cent, or any other per cent?"

Sections 4 and 5 of the Act (Laws of Mo. 1931, p. 232) state in each instance that the salary is not to exceed certain amounts. In 1933, the Legislature, at page 114 (Laws of Mo. 1933) passed what might be termed a blanket reduction in the salaries of the members and officials of the State Highway Department. The State Highway Patrol is under the control of the State Highway Commission, yet it is merely an auxiliary of said Commission, and we are of the opinion that the reduction in salaries and the limitation as contained in Section 2a (Laws 1933, p. 114) has no reference to the reduction of salaries of members of the State Highway Patrol.

We are also of the opinion that the Commission can increase the salary of enlisted men who have served five years 10%, or any other per cent, provided the increase in pay does not exceed

$2400.00 in the case of captains and $1800 in the case of patrolmen.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:AH

MERCHANT--LICENSE: Persons who deal in selling ice at any stand must obtain merchandising license and execute surety bond.

- -

January 22, 1936.

1-23

FILED 16

Honorable Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 11, 1936, which reads as follows:

> "Mr. Rohan is the General Manager of the Home Ice Company of Moberly, Missouri. This concern is engaged in the business of manufacturing of ice and selling the same to retailers for the retail trade. They do no retailing themselves.
>
> "Hugh Hinton, County Collector, has requested this institution to give bond for a merchandising license in Randolph County.
>
> "I would appreciate your advice on this subject as to whether or not the Home Ice Company is liable for a merchandising license. If possible I would appreciate this information being given verbally to Mr.Rohan and an opinion later sent to me. If it is not possible to give the information to Mr.Rohan immediately, you may then send the opinion to me, but I would appreciate one of your assistants discussing this problem with Mr. Rohan."

Section 10075 R. S. Mo. 1929, provides:

> "Every person, corporation or co-partnership of persons, who shall

> deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

Section 10076 R. S. Mo. 1929, provides:

> "No person, corporation or copartnership of persons shall deal as a merchant without a license first obtained according to law; and every person so offending shall forfeit to the state not less than fifty nor more than five thousand dollars for every such offense, to be recovered by indictment or information."

We believe that since the Home Ice Company of Moberly manufactures and sells ice to retailers, at the place occupied for that purpose, in the ordinary course of trade, that said company is a merchant and falls within the provisions of sections 10075 and 10076, supra, and is liable for a merchandising license tax. See State v. Whittaker, 33 Mo. 457.

In the case of Kansas City v. Ferd Heim Brewing Company, 73 S. W. 302; 98 Mo. Ap. 590, l. c. 594, the court said:

> "It will be seen by these decisions that a manufacturer may or may not be a merchant within the meaning of the charter and the statute of the State. If he keeps at a store, stand or other place, in stock articles manufactured by him for sale in the ordinary course of trade, he is a merchant. If he only manufactures upon order he is not a merchant. It is therefore a mixed question of law and fact whether a manufacturer is or is not a merchant."

The Missouri merchant's tax law does not specifically exempt merchants who sell to retail merchants, but who are not in the retail business themselves. We see no reason for exemption by implication.

The Laws of 1935, page 407, section 10078, provides:

> "Any person, corporation or copartnership of persons applying for a license to vend merchandise shall, before he or they shall receive such license, execute a bond to the state, with good and sufficient surety, conditioned that he will, on or before the first day of January next following, pay to the collector of the proper county the tax due upon such license; which bond shall be approved by the collector, and his approval indorsed thereon.

We are of the further opinion that before obtaining a merchant's license, the law requires that the Home Ice Company execute a merchant's bond as per section 10078, supra, which is to be approved by the county collector.

Yours very truly

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

PENSIONS: Accrued assistance due applicant to be applied on funeral expenses, When.

2-24

February 4, 1936

FILED
16

Miss Reba E. Choate
Assistant Commissioner of
Old Age Assistance
Jefferson City, Missouri

Dear Madam:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "Section 24 of the Missouri Old Age Assistance Law states:
>
> '. . . and in case any applicant shall die, having any accrued or unpaid assistance, the amount thereof shall be paid to the legal representative of such applicant; but if there be no administration upon the estate of the deceased applicant within a period of 60 days after his death, then the amount due shall be paid to whomsoever would be entitled thereto under the laws of this State and the provisions of this Act. . . . '
>
> "We should like to ask if accrued assistance does not constitute a portion of the applicant's estate and if, under Section 15 of the Law, it should not apply to burial expense. Will you study through this phase of the law and let us know whether or not accrued assistance is a part of the applicant's estate and Whether, as such,

it should apply on funeral benefit.

"We should appreciate your opinion soon."

Section 15 of the Old Age Assistance Act provides:

> "On the death of any person receiving old age assistance, such reasonable funeral expenses for burial shall be paid to such persons as the state board directs; provided, that such expenses do not exceed $100.00 and the estate of the deceased is insufficient to defray the same."

Section 24 of said Act provides that any accrued assistance due an applicant at the time of his death shall be paid to the legal representative of such applicant. If there be no administration on the estate of the deceased within a period of sixty days after his death, the amount is to be paid to whosoever is entitled thereto under the laws of the state. It is plain, therefore, that the accrued assistance due an applicant at the time of his death is to be paid to the administrator of his estate, if any. It is also plain that the board shall pay the funeral expenses of such person if they do not exceed one hundred dollars ($100.00), only in case the estate of the deceased is insufficient to pay the same. The accrued assistance paid to an administrator would, of course, be a part of the estate of said deceased pensioner and would be administered upon in the same manner as any other property. Whether or not the money so paid to the administrator, or any part thereof, would go to pay the funeral expenses would have to be determined in each particular case. Under the provisions of Section 182, Revised Statutes Missouri 1929, funeral expenses are placed in Class 1 of demands against the estate and have priority over other debts against the estate. However, in particular cases, statutory allowances are made to certain persons free of debt. For instance, under the provisions of Section 107, Laws of Missouri 1933, page 164, the widow or widower is entitled, in addition to dower, to certain

articles of property and such sums of money, in exclusion of all debts, claims, charges, legacies and bequests, as the court may deem reasonable for the proper support of said widower or widow and the minor children under the age of eighteen years, if any, for the period of one year after the death of the spouse.

In addition thereto, the widow or widower is allowed personal property not to exceed the appraised value of four hundred dollars ($400.00) under the provisions of Section 108, Revised Statutes Missouri 1929. And under the provisions of Section 110, if the widower or widow does not receive the property thus allowed, the court shall order the money to be paid to the widower or widow.

Under the provisions of Section 111, Revised Statutes Missouri 1929, if a widow or widower dies leaving no surviving husband or wife but minor children under eighteen years of age, they are entitled to the same property and allowances as the widow or widower would have been.

Under the provisions of Section 2, Revised Statutes Missouri 1929, the probate court may refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children under the age of eighteen years, and, if he order no letters of administration shall be issued on such estate, such widower, widow or minor children are authorized to collect, sue for and retain all the property belonging to such estate.

CONCLUSION

In view of the above, it is the opinion of this department that any accrued assistance due an applicant at the time of his death shall be paid to the administrator or executor of his estate, if one be appointed within sixty days after his death, and that the money so paid is a part of decedent's estate and should be administered upon as any other property belonging to the estate. If the probate court finds that the estate of such deceased person is not greater in amount than is allowed by law as the absolute

property of the widower, widow or minor children under the age of eighteen years, if any, such accrued assistance should be paid to such widower, widow or minor children. If the estate of such deceased pensioner is sufficient to pay the funeral expenses of the deceased, after deducting the costs of administration, and the absolute property allowed any widower, widow or minor children, then the State Board should not pay the funeral expenses of such person under the provisions of Section 15 of the Old Age Assistance Act. If the estate is not sufficient to pay the same, the Board should pay such expenses if they do not exceed one hundred dollars ($100.00).

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

OLD AGE PENSIONS: May not limit the number of assistance checks sent to out-of-state addresses, and permit same to accrue until persons return to Missouri.

February 13, 1936. 2-21

FILED 16

Miss Reba E. Choate,
Assistant Commissioner,
Old Age Assistance Division,
Jefferson City, Missouri.

Dear Miss Choate:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "A situation has now developed upon which we would like the advice of your department. A number of persons on the Old Age Assistance Roll have removed to other states stating that they plan to spend the winter or some such length of time with relatives out of the state. Our office is contemplating a ruling pertaining to such cases limiting the number of assistance checks which will be sent to out-of-state addresses.
>
> "Before making such a ruling, however, we would like to know whether or not it would in any way be contrary to law and whether or not, when the person returns to the state, he would have his accrued assistance. If he is entitled to accrued assistance when he returns to the state, it would be possible for him to come back once or twice a year, get the assistance and then be out of the state the rest of the time."

The fact that a person on the Old Age Assistance Roll leaves the State of Missouri to spend the winter or some such length of time with relatives out of the state

does not mean that he is no longer a "resident" of the State of Missouri and hence ineligible to receive assistance under the terms of the Old Age Assistance Act, as found in the Laws of Missouri, 1935, pages 308-315. This was pointed out in an opinion rendered your department under date of September 28, 1935, wherein thefollowing conclusion was reached after citing numerous authorities:

> "In view of the above authorities we think we can safely draw the following conclusions: That the word 'residence' as used in Section 6 of the Old Age Assistance Act, means the place where the family of any person shall permanently reside in this State, or, if such person has no family, where he or she shall generally lodge; that while the term 'domicile' and 'residence' are not synonymous that 'residence' does mean a fixed and determined home rather than a transient or temporary abode; that where a residence has been established, continuous personal presence thereafter is not essential to a continuous residence, especially when the person, whose residence is in question, has a family with whom he carries on family relations; that the continuity of a residence is not broken by a mere temporary absence with the intention of returning or without a definite intention of abandoning such residence; that if a person leaves his residence, and while absent forms the intent of not returning, the continuity of his residence is broken as though he had formed the intent at the time of removing. We call your attention to the fact that the question of 'residence' is a question of fact that must be determined in each individual case from all the facts and surrounding circumstances."

The question arises whether the State Board, as same is defined in the Act, can make a ruling limiting the number of assistance checks sent to out-of-state addresses.

Absent a finding by the State Board that a person on the Old Age Assistance Roll is not longer a "resident", he is

entitled to have his assistance check sent to any post office address that he desires, and any ruling withholding the issuance of an assistance check by reason of the fact that it goes to an out-of-state address would be void and contrary to the Act, as evidenced by Section 24, which provides in part that:

> "* * * requisitions shall state among other things that the requisitioner is the recipient of the assistance personally and that he or she has the free and full use thereof, and that the same is devoted exclusively to his or her needs, giving his or her present address; and each applicant shall forward each requisition for assistance last accrued to the State Auditor who shall draw a warrant in favor of such applicant upon the State Treasurer for any monies in the treasury available therefor and forward same to the applicant or the legal guardian thereof at such post office address."

"His or her present address" cannot be interpreted by any stretch of the imagination to refer only to Missouri addresses. As stated by the court in the case of Johnston v. Ragan, 265 Mo. 420, 178 S. W. 159, l. c. 163:

> "Statutes are not to be construed so as to result in an absurdity or to impose unnecessary burdens, and, in the absence of express terms, it will not be presumed that the Legislature intended to authorize and require an unreasonable proceeding. Neenan v. Smith, 50 Mo. 526."

Having come to the conclusion that a "resident" is entitled to have his assistance checks sent to any post office address he desires, it naturally follows that the checks cannot be held up and allowed to accrue to his benefit until he returns to the State of Missouri. Such fact is evidenced by Section 12 of the Act, which contemplates that all applicants who have all the qualifications and have been approved should be paid monthly, thus:

> "The county board shall issue to each applicant to whom assistance is allowed a certificate for one year, stating the amount of each installment, which shall be paid monthly."

The language of the statute is plain, clear and unambiguous and hence must be given effect, and a departure from its natural meaning is not justified by any consideration of consequences or public policy. Our court in the case of Betz v. K. C. Southern Ry. Co., 314 Mo. 390, 284 S. W. 455, l. c. 461, gave expression to the above language when it said:

> "In 36 Cyc. 1106, it is said: 'The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority.' And in 36 Cyc. 1114, it is furthermore said: 'In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect.' Ragland, J., speaking for this court, in banc, in Grier v. Railway Co., 286 Mo. l. c. 534, reviewing the selfsame statute, recognized the well-settled rule when he said: 'The primary rule for the interpretation of statutes is that the legislative intention is to be ascertained by means of the words it has used. All other rules are incidental and mere aids to be invoked when the meaning is clouded. When the language is not only plain, but admits of but one meaning, these auxiliary rules have no office to fill. In such case there is no room for construction.' And, in Clark v. Railroad Co., 219 Mo. l. c. 534, Lamm, P. J., speaking for this division of our court, aptly and pointedly said: 'Courts have no right, by construction, to substitute

> their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words. Expressum facit cessare tacitum. We must not interpret where there is no need of it. (McCluskey v. Cromwell, 11 N. Y. 1. c. 601-2.)'"

From the foregoing, we are of the opinion that a ruling by your department limiting the number of assistance checks which will be sent to out-of-state addresses and permitting same to accrue until the person returns to the State of Missouri would be void. We are of the opinion that a person having all the qualifications to bring him within the terms of the Old Age Assistance Act and who has had his application approved is entitled to receive his assistance check monthly, whether his post office address is in Missouri or in a foreign state.

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN,
(Acting) Attorney General.

MW:HR

OLD AGE PENSIONS: Applicant who has forfeited his citizenship by reason of conviction of desertion, not entitled to receive assistance.

3-16

FILED 16.

March 13, 1936

Reba E. Choate
Assistant Commissioner
Old Age Assistance Division
Jefferson City, Missouri

Dear Madam:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "We have received the following letter from Mr. C. E. Larkins, of the Buchanan County Old Age Assistance Board:
>
> " 'We are enclosing a copy of a letter from the Adjutant General's Office, Washington, regarding the application of Frederik Smith, this city.
>
> "This letter states that Mr. Smith has lost his rights of citizenship, but in the last paragraph you will note that their statement leaves some doubt in our minds as to whether or not this man is entitled to assistance inasmuch as the Prosecuting Attorney of this County has stated that it is his opinion that the man does not necessarily lose his right of suffrage in Missouri because of the action of the Federal Court-Martial pertaining to Army service.
>
> "This is the second case of this kind that has come to our attention, and we would be pleased to have an opinion from your department or the Attorney General's office so that we may be

able in the future to handle these cases promptly.'

"We have also a copy of the following letter from E. T. Conley of the Adjutant General's office, Washington, D. C.

" ' I have your letter of February 21, 1936, in which you request information concerning citizenship in the case of Frederik Smith.

"The records show that Frederik Smith enlisted October 22, 1885, at Albany, New York, and was assigned to Company D, 19th U. S. Infantry. He was tried by a general court-martial convened at Ft. McIntosh, Texas, and found guilty of desertion, and was sentenced to be dishonorably discharged the service of the United States, forfeiting all pay and allowances due him, and to be confined at hard labor, in such place as the proper authority shall direct, for a period of four (4) years and six (6) months. The sentence was approved and promulgated in G.C.M.O. #36 dated Hqrs. Dept of Texas, June 1, 1886.

"Rights of United States citizenship are forfeited under Sections 1996 and 1998 U. S. revised statutes, only upon conviction by a general court-martial of desertion committed prior to August 22, 1912, or subsequently in time of war.

"Mr. Frederick Smith has lost his rights of citizenship.

"Nothing has been found of record to show that his rights of citizenship have been restored. However, the rights of suffrage differ in several states and what effect is given in any one of them to a dishonorable discharge, desertion from the Army, is a matter determined under the

constitution and laws of that state.'

"After you have read through these two letters, will you give us an opinion on the citizenship standing of Frederik Smith, as it would apply to Section 6 of the Missouri Old Age Assistance Law. "

Section 6 of the Old Age Assistance Act provides the qualifications an applicant must have to receive old age assistance. Said Section reads as follows:

"Old age assistance may be granted only to an applicant who, has attained the age of 70 years or upwards, is incapacitated from earning a livelihood and is without adequate means of support, is a citizen of the United States, has resided in the State for 5 years or more within the 9 years immediately preceding application for assistance and for the one year next preceding the date of application for assistance (absence in the service of the State or of the United States shall not be deemed to interrupt residence in the state if domicile be not acquired outside of the state), is not at the date of making application or of receiving aid an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution,and has no child or other person responsible under the law of this state and found by the state board or by the county board able to support him."

The above section specifically provides, among other things, that old age assistance will only be granted to a citizen of the United States.

Section 12, Title 8, U. S. C. A. provides:

"All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a

> provost marshal within sixty days after the issuance of the proclamation by the President, dated March 11, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.
> * * * * * * * * * * * * *"

The above section was first enacted March 3, 1865.

Section 11, of Title 8, which was enacted August 22, 1912, provides:

> "Every person who deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section 12 of this title. The provisions of this section and said section 12 shall not apply to any person deserting the military or naval service of the United States in time of peace. The loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests."

According to the letter received from the Adjutant General's office, quoted above, the applicant in question was tried by a general court-martial and found guilty of desertion and said sentence was approved June 1, 1886. As this conviction occurred prior to August 22, 1912, it is plain that the applicant forfeited his right of citizenship. Under the provisions of Section 11, supra, the right of citizenship so forfeited prior to August 22, 1912 may only be remitted by the President. According to the letter from the Adjutant General's office this has not been done.

In view of the above, it is the opinion of this department that a person who was convicted by a general court-martial, of desertion, prior to August 22, 1912, forfeits his right of citizenship and unless such citizenship is restored by order of the President such person is not entitled to receive old age assistance under the provisions of Section 6 of the Old Age Assistance Act of the State of Missouri.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

CIRCUIT CLERKS: Change of Venue fees earned prior to the first Monday in January, 1935, are payable into the County Treasury.

April 17, 1936.

FILED 16

Honorable Richard Chamier
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

We acknowledge your request for an opinion dated April 10, 1936, which reads as follows:

> "Alfred C. Jones, Circuit Clerk of Randolph County, Missouri, has requested the following opinion: Ray McDonald was the Circuit Clerk of Randolph County, Missouri, during the time that office was on a salary basis. Several cases came to Randolph County on a change of venue. The Clerk of the Circuit Court is entitled by law to fees from change of venue cases in addition to his salary.
>
> "The cases were not disposed of until the retirement of Ray McDonald from office. The fees were paid during the time Alfred Jones was Circuit Clerk.
>
> "Mr. Jones wishes to know whether he is entitled to keep the fees earned during McDonald's administration and paid during his administration, or if he must pay said fees to McDonald, the former Clerk.

I am enclosing herewith a copy of an opinion rendered by this department by the Honorable Carl C. Abington, Assistant Attorney General, to Honorable Forrest Smith, dated February 28, 1933. I am also enclosing a copy of an opinion rendered by this department by the Honorable James HornBostel, Assistant Attorney General, to Charles S. Huckstep, dated April 1, 1935.

Construing these two official opinions together, this department has held that a circuit clerk holding the office prior to the first Monday in January, 1935, received legal compensation as a salary and not on a fee basis. We held that said salary was in lieu of all fees, including fees for change of venue cases. We held that the circuit clerk, during this period, collecting change of venue fees must account for same and pay them into the county treasury in accordance with the provisions of Section 11814 R.S. Mo. 1929, then in force. In the opinion to Mr. Huckstep we held that a circuit clerk, holding an office after the first Monday in January, 1935, was entitled to retain, as compensation for services, all fees earned by him in cases of change of venue from other counties, without accounting for same.

It is elementary law that a public officer is entitled only to those fees which he can point his finger to in the statutes authorizing same. Your letter admits that the change of venue fees were earned in the McDonald administration, that is, were earned prior to the first Monday in January, 1935. There can be no doubt that these fees, not being earned by Mr. Jones, do not belong to Mr. Jones, the present circuit clerk. We have already shown by opinion to Forrest Smith that Mr. McDonald is not entitled to them, for he was entitled only to his salary for the time he held office.

Section 11814, Laws of Missouri 1933, p. 372, provides:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy

same on the persons liable therefor, or their sureties, as authorized and provided by section 11776. Such clerk shall, at the end of each quarter, file with the county clerk a report of all fees paid and accruing to his office during such quarter, stating the title of the case or on what account such fees were charged, together with the names of the persons paying or who are liable for same, with the names of all sureties, where security for costs has been required, and which report shall also show which of such fees have been paid and the total amount thereof, and what fee bills, if any, have been issued and for what fees and when placed in the hands of the sheriff for collection, and further stating that, after due diligence, he has been unable to collect the fees reported unpaid, and which said report shall be verified by the affidavit of such clerk. And quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the county court to examine such quarterly report and to require of the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law, and, to that end, such prosecuting attorney shall have authority, at any time, to direct the issuance of any execution or fee bill for costs in any case in which any costs accruing to the county are unpaid."

CONCLUSION.

We are of the opinion that these change of venue fees earned prior to the first Monday of January, 1935, should be paid into the County Treasury, as provided in Section 11814, Laws of Missouri, 1933, p. 372, supra.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

OLD AGE PENSIONS: Federal Grants, to whom paid

L-23

April 22, 1936

FILED
16

Miss Reba E. Choate
Assistant Commissioner
Old Age Assistance Division
Jefferson City, Missouri

Dear Madam:

This will acknowledge receipt of your letter requesting an opinion from this Department, which reads as follows:

> "We have received a telegram from Jane M. Hoey, Director, Bureau of Public Assistance, Federal Social Security Board, which reads as follows:
>
> " 'To facilitate consideration of your fourth quarter Federal fund request we need statement of Attorney General as to proper person to receive Federal funds.'
>
> "May we, as quickly as possible, have your statement pertaining to this information to Miss Hoey."

Section 27 of the Old Age Assistance Act, Laws of Missouri 1935, page 314, is determinative of your inquiry. Said section reads as follows:

> "The State Treasurer is hereby authorized, empowered and directed

to accept gifts, grants, devises and bequests of money or property and credit or hold same to or for the account of the Old Age Pension Fund. Whenever the Government of the United States by act of Congress, or otherwise, appropriates or grants money to the respective states for the payment of Old Age Pensions or for the payment of Old Age Assistance, and for the expenses of the administration thereof, then this State hereby accepts the benefit thereof and the State Board shall cooperate with the Federal Government in the administration of this Act, furnish the Federal Government with any and all information desired relative to the payment of pensions or old age assistance and the cost of administration of this Act, and do any and all other things which may be necessary or required so that the State of Missouri may secure the full benefit of any Act of Congress providing for payment of all or part of the costs of carrying out the provisions of this act."

CONCLUSION

In view of the above, it is the opinion of this Department that Federal grants of moneys to the State of Missouri for old age pensions should be paid to the State Treasurer, whose duty it is to accept such grants and to hold same for the account of the Old Age Pension Fund.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

INCORPORATED CITIES: May enact zoning ordinances.

May 1, 1936. 5-1

FILED 16

Dr. J. G. Christy, Speaker
House of Representatives
Festus, Missouri

Dear Doctor Christy:

We acknowledge receipt of your letter requesting an official opinion, which reads as follows:

> "One of the aldermen from Crystal City asked me to write you.
>
> "He wishes to know if they are allowed to pass a zoning ordinance for a certain area of their city. Crystal City is a city of the 4th class. Seems they wish to restrict certain shacks that are being erected."

Crystal City is an incorporated city and also a city of the fourth class. Article XI, Chapter 38, R. S. Mo. 1929, pertains to building zones or districts in certain cities. Section 7270 of the above Article and Chapter provides:

> "That the provisions of this article shall apply to all incorporated cities, towns and villages in this state: Provided, that nothing in this article shall apply to any county now having or may hereafter have a population of not exceeding 15,000 inhabitants."

The purpose of this law is found in Section 7259 R. S. Mo. 1929, which reads:

> "For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of all incorporated cities, towns and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings

and other structures, the percentage of lot that may be occupied the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

The statutory provisions and regulations to be considered and followed in enacting any zoning law may be found in Article XI, Chapter 38, R. S. Mo. 1929. We assume that you have a copy of the above Statutes available and are therefore not copying the whole of this Article.

CONCLUSION.

It is the opinion of this department, from the foregoing, that Crystal City, Missouri, being an incorporated city, may enact ordinances creating certain zoning districts in accordance with Article XI, Chapter 38, R. S. Mo. 1929.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

ARH:H

OLE AGE PENSIONS: Naturalized citizen entitled to benefits of Old Age Assistance Act even if records of Naturalization have been lost or destroyed, if citizenship can be shown by other evidence.

May 15, 1936

5-18

FILED
16

Miss Reba E. Choate
Assistant Commissioner
Old Age Assistance Division
Jefferson City, Missouri

Dear Madam:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

> "Section 6 of the Missouri Old Age Assistance Law state, 'old age assistance may be granted only to an applicant who . . . . is a citizen of the United States. . . . '.
>
> "We have been informed by the Naturalization authorities that prior to 1906 the Federal Government did not keep duplicate records of persons receiving naturalization, therefore, unless the person becoming naturalized prior to 1906 did so under the Homestead Act, the only record of the granting of citizenship would be in the local court through which the final papers were granted.
>
> "We have a few applicants for Old Age Assistance who claim to have received naturalization rights prior to 1906. The local court records have been destroyed by fire, the applicant has lost the papers granted him and the Federal Naturalization Office can give no help as they have

no record and they decline to make a statement as to the applicant's citizenship standing and cannot accept affidavits of persons who claim to have seen the naturalization papers. In the absence of any official record to show that an applicant is a citizen of the United States and when the Federal Naturalization Office says that it is not in a position to make a statement pertaining to applicant's citizenship standing, what in the opinion of your office would be the citizenship standing of such an individual under the Old Age Assistance Law? In each case in question, the applicant has voted for many years and executed in every way all the rights of citizenship."

Section 6 of the Old Age Assistance Act, Laws of Missouri 1935, page 310, which specifies the qualifications an applicant must have before old age assistance may be granted to him, requires such an applicant to be a citizen of the United States. If an applicant is a citizen of the United States he is entitled to the benefits of the Act, provided he is otherwise qualified, whether he be a citizen by naturalization or birth. The fact that the Federal Government did not keep duplicate records of the naturalization of applicants for old age assistance and that the local court records pertaining to same have been destroyed would not affect such applicant's citizenship or his right to receive old age assistance. Official records of naturalization are, of course, the best evidence of same but where they have been lost or destroyed secondary evidence is admissible and should be accepted to prove citizenship.

2 Corpus Juris Section 161, page 1128, reads as follows:

> "The naturalization laws expressly require the proceedings to be recorded, and in the absence of proof of the loss or destruction of the record, it can be proved only by itself or by an extract therefrom. Parol Evidence is ordinarily inadmissible for this purpose.
>
> "Record destroyed or impossible of production.
> But in cases where the record has been lost or destroyed, or by reason of lapse of time and the death of the person naturalized the record cannot be produced, secondary evidence is admissible to prove naturalization. Before such proof outside of the record can be resorted to, some excuse must appear for the substitution of the secondary evidence for the documentary proof. "

Section 160 of the same Volume provides, in part:

> "The burden of establishing naturalization is on the party affirming it and to whose care it is material * * * * *
>
> "Where no record can be produced showing the naturalization of an alien possessing the requisite qualifications to become a citizen,

> naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen. * * *"

11 Corpus Juris, Section 22, page 786, reads, in part:

> "Citizenship may be established by the admission in evidence of judgments of naturalization, and by a showing of the exercise of the rights and duties of citizenship."

Section 23 states:

> "Direct testimony of a party that he is a citizen is competent; but such testimony given by a third person is incompetent as calling for a conclusion on the part of the witness."

Section 25 reads, in part:

> "While it has been held that citizenship will not be presumed merely from the fact of having owned real estate, having voted, or having held an elective office, it seems that having participated in elections and having held elective offices are facts strongly tending to establish at

least a prima facie evidence
of citizenship; "

In the case of Hogan v. Kurtz 24 L. Ed. 317, the Supreme Court of the United States, at l. c. page 319, said:

> "Proceedings of the kind are required to be recorded; but it was proved or conceded that the records of such proceedings in this District were destroyed many years ago; and in view of that fact, and of the long period between the purchase of the property and the other evidence exhibited in the record, the court left the question whether the party was or was not naturalized to the jury, and they found the issue in favor of the defendant. Seasonable objection was made by the plaintiffs to the admissibility of the parol evidence, and they now contend that the court erred in admitting secondary evidence to prove that the party became a citizen.
>
> "Enough appears to show that he possessed every requisite qualification to enable him to become a citizen at any time, and that he constantly exercised rights belonging to citizens; and, in view of the great lapse of time since he acquired the property, the court here is clearly of opinion that the assignment of error must be overruled."

CONCLUSION

In view of the above, it is the opinion of this Department that a naturalized citizen of the United States is entitled to receive the benefits of the Old Age Assistance Act if he is otherwise properly qualified,and that the

fact that the Federal Government did not keep duplicate records of his naturalization and the court records admitting such person to citizenship have been destroyed, would not affect his citizenship or his right to old age assistance Where the official records of the person's naturalization have not been kept or are lost or destroyed, he may pfove the fact of his naturalization by secondary evidence. Direct testimony or an affidavit of an applicant that he is a citizen is competent evidence and should be received and considered, together with all the other facts pertaining to an applicant's citizenship. The fact that an applicant has voted and exercised all the rights of a citizen would make at least a prima facie case of citizenship and entitle such an applicant to the benefits of the Old Age Assistance Act, unless there is competent evidence to the contrary.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

DEANTAL BOARD: Discretion in Board to determine method of examination.

5/22

May 22, 1936.

FILED
16

Doctor J. G. Christy
Festus,
Missouri.

Dear Doctor Christy:

You have requested an opinion of this office on the following matter:

> "Has the Missouri Dental Board the power to determine the method of examination of applicants and what discretion is granted the Board by the Dental Practice Act?"

Section 13560 R. S. Missouri 1929, refers specifically to the examination of applicants for licenses to practice dentistry in the State of Missouri. This section in part reads as follows:

> "The method of examination for requirements for entrance shall from time to time be determined by said board. Should any applicant for entrance misrepresent his actual credits to which he or she may be entitled, or shall receive any certificate which is a misstatement as to his or her actual literary qualifications, he or she shall upon conviction be adjudged guilty of a misdemeanor and punished as provided for in this chapter; and any person who assists any applicant to misrepresent or fraudulently obtain any certificate or writing showing credits to which said applicant is not entitled shall likewise upon conviction thereof be adjudged guilty of a misdemeanor and punished according to the terms of this chapter. All examinations for registration

> may be written or clinical, or both, and of such character as to thoroughly test the qualifications of the applicant to practice dentistry or dental surgery. No person shall be eligible to registration as one competent to practice dentistry in this state unless the applicant in his or her examination shall make a grade or percentage required by the board which shall not be less than an average of seventy-five per cent. in the subjects for examination required by this chapter; it shall be the duty of said dental board to make careful investigation as to the moral standing of the applicant; the board may in its discretion refuse to grant a certificate of registration to any person found guilty of making any false statement with the intent to mislead said board, or any member thereof, or who shall cheat, or attempt to cheat, or deceive said dental board or any member thereof, either in application for a certificate of registration, or in taking said examinations, or in procuring a license. If the applicant shall pass a satisfactory examination, and in the opinion of the board, shall possess the qualifications required by this chapter to entitled him or her to registration as here provided, then the board shall issue to such applicant a certificate of registration, which certificate shall be signed by all members of said board and attested by the seal of said board;* * *"

It is to be noted that the first underscored phrase places in the board the power to determine the method of examination from time to time. It requires, by the second underscored phrase that the examinations shall be "written or clinical" or the examinations may include both, but shall be of such character as to test the qualification of the applicant to practice dentistry or dental surgery. By this provision it is certain that the Board has discretion in determining whether the examinations given are to be written or clinical, and the examination may be either or as the statute states "both". This is a matter for the board to determine in the exercise of its discretion. After passing a satisfactory

examination, meeting the requirements of an average grade of seventy-five per cent in the subjects required by the statute, and if in the opinion of the board the applicant possesses all of the qualifications required by the act, a certificate of registration shall be issued.

CONCLUSION.

It is therefore the opinion of this office that in view of the provisions of Section 13560 R. S. Missouri 1929, the Missouri Dental Board may exercise discretion in determining the method of examination of applicants and the examinations may be "written or clinical or both".

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW:MM

FOR OPINION 300

DEPARTMENT OF PENAL INSTITUTIONS: Contract between Metropolitan Mfg. Co. and Dep't. of Penal Institutions is legal.

7/2

June 27, 1936.

FILED
16

Mr. R.L. Chapman,
Sup't. of Industries,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of June 16 wherein you attach a contract made by and between the Department of Penal Institutions and the Metropolitan Manufacturing Company, a corporation; also, a surety bond issued by the Standard Accident Insurance Company, guaranteeing the faithful performance of a contract to the amount of $5,000 on the part of the Metropolitan Manufacturing Company, desiring to know whether or not the contract between the Department of Penal Institutions and the Metropolitan Manufacturing Company is valid and legal.

We have examined the contract and believe that it meets the requirements necessary for the legal contract in that (1) the parties appear to have the capacity to contract; (2) the consideration is stated definitely and is a legal consideration; (3) the contract was made for a legal object; and (4) it is properly executed.

You next desire to know whether or not the officers of the corporation have legally bound the corporation, and whether or not it is necessary to have Mr. Kessler and Mr. Peszko, the new President and Vice-president, respectively, sign it. We do not have before us a copy of the by-laws or charter of the corporation, but as usual, the President and the General Manager or other officer can bind the corporation.

In the case of Rosenbaum v. Gillian, 101 Mo. App. 186, it was said:

> "Where an officer, placed in control of the affairs of a corporation, and permitted to manage its business, deals with a party with respect to the affairs of the corporation has no

> no knowledge of the want of the officer's authority, such party may hold the corporation, although the latter exceeds its authority."

And in the case of Coleman v. Insurance Company, 273 Mo. 620, the Court said:

> "A document attested by the corporate seal and ostensibly signed by the president and attested by the secretary, which purports to be the act of the corporation * * * is not conclusive, but only raises the presumption that the officers acted within their authority."

Section 4559, R.S. Mo. 1929 relates to Parol contracts on the part of corporations, and is as follows:

> "Parol contracts may be binding upon corporations if made by an agent duly authorized by a corporate vote, or under the general regulations of the corporation; and contracts may be implied on the part of such corporations from their corporate acts, or those of an agent whose powers are of a general character."

CONCLUSION

It is our opinion that the officers whose names are signed to the contract on behalf of the corporation have authority to bind the corporation and have done so by their acts. It is not necessary that the new officers ratify or sign the contract, but if you care to have any officer do so, it will be perfectly proper. The attached surety bond is in proper form, and in the event of default or refusal to comply with the terms of the contract by the Metropolitan Manufacturing Company, we think the surety company will be bound to the extent of $5,000.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
ATTORNEY GENERAL

MUNICIPAL CORPORATIONS: } Board of Aldermen in Cities of Fourth Class has authority to divide city into wards.
CITIES, TOWNS & VILLAGES: }

September 30, 1936.

FILED
16

Dr. J. G. Christy
Festus, Missouri

Dear Dr. Christy:

This is to acknowledge receipt of your letter of recent date in which you requested the opinion of this Department. Your letter of request is as follows:

> "One of the Aldermen of Crystal City is in my office, and wishes to know the procedure they must go thro to create another Ward in that City.
>
> "That city was formed many years ago. Due to the growth of the Plate Glass Factory they have increased a great deal in population. Still they have only two Wards and really need another.
>
> "It seems that they are unable to obtain the desired information on the correct procedure, so asked that I write your office."

Supplementing the above letter, you state that Crystal City is a city of the Fourth Class. Section 6963, R. S. Mo. 1929, Vol. 8, Missouri Annotated Statutes, page 5722, provides the method for dividing a city of the Fourth Class into wards, and is as follows:

> "The board of aldermen shall, by ordinance, divide the city into not less than two wards, and two aldermen shall be elected from each ward by the qualified voters thereof, at the first election for aldermen in cities adopting the provisions of this article. At such election for aldermen, the person receiving the highest number of votes shall hold his office for one year; but thereafter each ward shall elect annually one alderman, who shall hold his office for two years."

It will be noted by said section that the Board of Aldermen in cities of the Fourth Class are authorized by ordinance to divide such cities into not less than two wards. The above section of our statutes is cited in State ex rel. Brown v. McMillan, 108 Mo. 153, and State ex rel. Brown v. Town of Westport, 116 Mo. 582.

The board of aldermen should by its ordinance set out with particularity, by metes and bounds, the description of the proposed newly created ward.

It is therefore our opinion that the Board of Aldermen of Crystal City may, by ordinance, proceed to divide said city into wards; of course, not less than two. The ordinance should be passed and adopted in the usual and customary way as provided in the statutes in cities of the Fourth Class.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

ELECTIONS: CITIES: When registrars are elected in cities of 10,000 to 30,000 population.

10-14

October 10, 1936.

FILED 16

Hon. Richard Chamier,
Prosecuting Attorney,
Randolph County,
Moberly, Missouri.

Dear Mr. Chamier:

We are in receipt of your inquiry of October 6, 1936, wherein you state as follows:

> "Several persons were elected Registrars in the general election of 1934. In the primary election of 1936 other persons ran for the office of Registrar in the same ward where the office was held by persons running for the same in 1934. The persons running in 1936 claim the intention of the law was to create two Registrars in each ward, the same being elected in alternate even years.
>
> "We would appreciate your immediate advice regarding the number of Registrars and the right of persons nominated for that office in 1936 to have their name upon the ballot."

Section 10543, R. S. Mo. 1929, is the only provision we find prior to the 1933 Session Acts dealing with the election of a registrar of elections, and it applies only to "cities of this state which now contain or may hereafter contain 25,000 inhabitants and less than 100,000 inhabitants." We understand that Moberly has a population of between 10,000 and 25,000 inhabitants.

In 1933 the Legislature repealed Article 16 of Chapter 61, R. S. Mo. 1929, and enacted a new law in lieu thereof - Laws of Missouri, 1933, p. 239.

Section 5 thereof, in part, states as follows:

> "In all cities of this state which now contain or may hereafter contain 10,000 inhabitants and less than 30,000 inhabitants, at each general election for State officers, there shall be elected, in each election district or ward of such cities, by the qualified voters of such election district or ward, one registrar of election, * * * and who shall hold office for four years and until his successor is elected and qualified."

Section 30 thereof provides that in all cities and towns

> "now having a board of registration, in which the registration of voters has been had in accordance to law, the board of registrars duly elected at the election of November, 1932, shall constitute the board of registrars for said city under the provisions of this article as rewritten until the general election 1934."

It does not appear that there was authority for a board of registration prior to the passage of this law as to cities containing a population of less than 25,000 and more than 10,000, and if so, Section 30, supra, has no application to the question at hand.

The question here presented is, what is the meaning, as used by the Legislature in the 1933 enactment, of the words "at each general election for state officers."

It seems plain that Section 5 provides for the election by the qualified voters of each election district or ward of one registrar, and also that he shall hold office for four years and until his successor is elected and qualified.

Section 1 of Article V of the Missouri Constitution states:

> "The executive department shall consist of a Governor, Lieutenant-Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General and Superintendent of Public Schools, * * *."

Section 2 of Article V of the Missouri Constitution provides:

> "The term of office of the Governor, Lieutenant-Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General and Superintendent of Public Schools shall be four years from the second Monday of January next after their election, * * *. At the general election to be held in the year one thousand eight hundred and seventy-six, and every four years thereafter, all of such officers, except the Superintendent of Public Schools, shall be elected, and the Superintendent of Public Schools shall be elected at the general election in the year one thousand eight hundred and seventy-eight, and every four years thereafter."

Section 8 of Article VI of the Missouri Constitution provides that in filling the office of judges of the Supreme Court,

> "as their terms expire, one judge shall be elected at the general election in eighteen hundred and seventy-six, and one every two years thereafter."

Section 10166 of Article 1, Chapter 61, R. S. Mo. 1929, dealing with elections, of which chapter the registration laws are a part, states:

> "On the first Tuesday after the first Monday in November, in the year 1880, and every four years thereafter, there shall be an election held in each township in this state, and in each ward of the city of St. Louis, for the election of governor, lieutenant-governor, secretary of state, state auditor, state treasurer and attorney-general, who shall hold their offices for the term of four years after the second Monday in January next after their election, and until their successors are elected and qualified."

Thus it will be observed that in 1876, and every four years thereafter, the law provides for an election at which most of the

elective officers are chosen, but it also provides that the superintendent of public schools shall be elected in 1878 and every four years thereafter, and a judge of the Supreme Court is elected every two years.

The meaning of a particular part of a statute is often determined by the whole law, and construed in the light of the other provisions of the law, is different from what it would be if construed as an isolated statement. If the matter here considered were but an isolated statement, it would appear that the term "at each general election for state officers" would be every two years because state officers of one kind or another are elected every two years in Missouri. However, we incline to the belief that in arriving at the meaning of this term "at each general election for state officers", there should be considered not merely the bald definition of those words standing alone and disassociated from the context of the law, but they should be construed with reference to the whole enactment and to the law with reference to elections as it appeared at that time on the statute books.

So construing it, we find that Section 10166, supra, contemplates the general election to be once every four years for the election of the major portion of the officials of the state, and it provides that they shall hold their offices for the term of four years after the second Monday in January next after their election, and until their successors are elected and qualified, and that the election at which they are elected shall be held in November in the year 1880 and every four years thereafter.

Further, Section 5 of the 1933 Session Acts, p. 241, provides that "one registrar of election" shall be elected, and that he shall "hold office for four years and until his successor is elected and qualified." It next thereafter provides, "Said registrar shall," etc. It thereafter provides that all vacancies occurring in the office of "registrar" shall be filled in a certain way.

It will be noted that the singular instead of the plural is used in each of the above instances, but later in the section, speaking of the appointment for each of the election districts or wards of the cities, the law uses the plural "registrars." If the Legislature meant that there should be a registrar elected every two years, it is difficult for us to understand why they used the term in the singular with reference to the registrar as to all parts of the section except where speaking of all of the registrars of all of the districts or wards of the cities and used the plural there.

It appears to us that the fair and reasonable meaning of this provision, construed in the light of the context, is that there should be elected one registrar of election in such election district or ward of said cities at the general election in 1934, and that he shall hold his office until 1938, or four years thereafter, and until his successor is elected and qualified, and that absent a vacancy by resignation, death, etc., there is no occasion for the election of a registrar in the year 1936, and that no name should appear upon the ballot as such candidate.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

COUNTY BUDGET ACT: When anticipated revenue is exhausted, no more warrants should be issued.

117

November 16, 1936.

FILED
16

Honorable Paul N. Chitwood,
Prosecuting Attorney,
Reynolds County,
Ellington, Missouri.

Dear Sir:

This department is in receipt of your letter of November 9, wherein you request an opinion as to the following condition which has arisen in your county:

> "It appears that there are insufficient funds of the revenue of Reynolds County of which to pay off warrants issued and to be issued on particular funds at this time.
>
> "The various appropriations made by the county court of this county in accordance with the County Budget Law of 1933, have been exhausted and no more funds are available in such funds with which to pay off additional warrants which might be issued for the remainder of this year.
>
> "I have advised the county court that no more warrants should be allowed to be issued for remainder of this year in view of the depleted finances of the county; although I have been unable to find any decisions to sustain my position. I shall be pleased to have your opinion on the point in question. I do not believe that any more county warrants will be issued; but of course, I want to be absolutely certain about the matter."

In the caption of your letter it appears that your question refers mainly to the particular fund being exhausted under the County Budget Act, while it appears from your letter proper that the entire funds of your county in every class have been exhausted, and in view of the fact you have advised the County Court that no more warrants should be issued on any class due to the depleted financial condition of the county, we shall treat your inquiry from the angle that all funds are now exhausted.

The County Budget Act (Laws of Mo. 1933, p. 340 et seq.) makes it the primary duty of the county court, at the regular February Term thereof, to estimate and classify proposed expenditures for the year into five classes and to sacredly preserve the priorities of the classes therein named, the sixth class being indefinite in its terms, contemplated to provide for any excess funds which might remain after provision has been made for the five prior classes.

Under Section 4 of the Act (p. 343) under "Estimated Receipts" there is the following provision:

> "Estimate from taxes for ordinary revenue for current year.
>
> * * *
>
> "Total estimated county revenue for the current year from all sources.
>
> "Ten per cent shall be deducted from total for delinquent taxes to get the net amount estimated for purposes of budget.
>
> "The court must balance its estimated budget for the year for the first five classes on the net estimate. * * * * * "

Under Article X, Section 12 of the Constitution, a county court is prohibited from becoming indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year.

In the case of Watson v. Kerr, 279 S.W. 692, it was held that if, at the time of the creation of an indebtedness it is within the income which may reasonably be anticipated, it is valid, and that mere errors in judgment in estimating whether indebtedness can be incurred and the total expenditures still kept within the income is not sufficient to impeach good faith of the county court, and that there must have been fraud or palpable attempt to evade Section 12, Article X of the Constitution. There are numerous other decisions to like effect.

The Watson v. Kerr Case further held that even though indebtedness of a county resulting from current expenditures during the year reached an amount at its close that at some time during the year it must have become apparent that indebtedness as a whole would exceed the income and be invalid within Article X, Section 12 of the Constitution, it cannot be held that the entire indebtedness, to the extent it was created by the county court, or that incurred through its action before such situation disclosed itself, was invalid.

The County Budget Act was enacted for the purpose of promoting efficiency and economy in county government; however, it did not destroy the former financial structure of the county, the principal change being to the effect that the five classes which formerly existed are now mandatory in that the priorities of payment must be sacredly preserved.

CONCLUSION

It is the opinion of this department that if your county court has issued warrants to the amount of the anticipated revenue as contained in the Budget Act, no further warrants should be issued, because as pointed out in the case of Watson v. Kerr, the same would be invalid if in excess of the anticipated revenue. We think it was the intention of the Legislature in enacting the Budget Act that county courts should not be permitted to issue warrants in excess of 90% of the anticipated revenue and that said warrants should come within the estimate as compiled and filed by the county court.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:AH

PROBATE JUDGES: May not act as appraisers or receive fees in such capacity.

December 17, 1936.

12-21

FILED 16

Hon. Richard Chamier,
Prosecuting Attorney,
Moberly, Missouri.

Dear Sir:

We are in receipt of your request for an opinion under date of December 7, 1936, wherein you state as follows:

> "The Probate Judge of Randolph County has indulged in the practice of appointing himself as an appraiser to value estates being probated in his office. He is desirous of knowing if he is violating the law when he acts as an appraiser. He takes the position that inasmuch as he is acting as an individual that it is proper to continue such practice.
>
> "Assuming that the practice is not a violation of the law, he then asks if it is his duty to report the fees earned by him in his capacity as an appraiser in his reports to the County on fees collected from his office as Probate Judge.
>
> "I will thank you to render an opinion on this subject at your convenience."

Section 57, R. S. Mo. 1929, provides that executors and administrators are to take charge of the estate immediately after the grant of letters.

Section 58, R. S. Mo. 1929, provides that they shall make an inventory and appraisement and states in part that:

> "Such appraisement, verified as provided in this article, shall be accepted unless another appraisement be ordered by the court, as proof of the value of the property appraised, for the purpose of assessing the state inheritance tax, and as the assessed value required in sale of real estate under the provisions of article six of this chapter."

Section 61, R. S. Mo. 1929, provides for the appointment of three persons to appraise the personal property of the estate, thus:

> "At the time of appointing an executor or administrator the court or judge or clerk in vacation shall name three respectable householders of the vicinity of the last abode of the deceased, who was disinterested and of no kin to the administrator or executor, as witnesses, to accompany and aid the administrator or executor in opening and examining the papers, money and other property of the deceased, and in making an inventory thereof, and to appraise all the personal property required by law to be appraised, and if they fail to attend the court or judge or clerk thereof in vacation shall appoint others in their stead, so that three witnesses shall be present to attend the proceeding before it shall be lawful for the executor or administrator to open or examine such papers, money or other property by virtue of his appointment."

Section 72, R. S. Mo. 1929, provides the pay of appraisers, thus:

> "Each witness to the inventory and appraiser shall receive from the estate three dollars per day for his attendance; also such further sum as the court may allow where expert or special services are required to be rendered by the witness to inventory and appraiser."

The judge having appointed himself appraiser, under Section 61, supra, could under Section 72, supra, allow himself $3.00 per day for his services, and also, in his discretion, whatever sum he desired for expert or special services. Then if the judge could not agree with the other two appraisers as to the fair cash value of the property, all that would be necessary would be for him to order another appraisement under Section 58, supra.

We could go into other sections of the statutes providing for the appointment of appraisers by the probate court, but we feel that the foregoing sections are sufficient to indicate the mischief and injury that would result in permitting a probate judge to appoint himself as an appraiser to value estates.

The court in the case of State v. Bowman, 170 S. W. (Mo. App) 700, quotes with approval the definition of "public policy" in Black's Law Dictionary, thus:

> "The term 'policy,' as applied to a statute, regulation, rule of law, course of action, or the like, refers to its probable effect, tendency, or object, considered with reference to the social or political well-being of the state. Thus, certain classes of acts are said to be 'against public policy,' when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality."

And on page 703 of the above opinion, the court said:

> "In 23 Ency. of Law, 338, after stating that it has often been enacted that members of legislative bodies are ineligible to offices created by such bodies, the text adds:
>
> "'The same rule applies to officers with the power of appointment. They cannot appoint themselves.'"

To permit judges of the probate court to appoint themselves as appraisers would be injurious to the interests of the

public and clearly in violation of public policy. We are, therefore, of the opinion that a judge of the probate court may not act as an appraiser, and hence is not entitled to fees earned in such capacity.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

COUNTY TREASURER:
DEPOSITARY OF COUNTY FUNDS:

Liability of County Treasurer on official bond, where no depositary bond is given.

February 12, 1936.

2-15

FILED
17

Senator Geo. D. Clayton, Jr.,
Hannibal,
Missouri.

Dear Senator Clayton:

This is to acknowledge receipt of your letter of February 7, 1936, in which you request an opinion from this Department on questions submitted in your letter of that date, a copy of which is as follows:

> "Is the County Treasurer liable for any loss of the County funds through the negligence or failure of any depositary, provided that the depositary has been selected by the County Court?
>
> "I would also like to know if the treasurer would be liable under his bond in the event that the County Court designated a depositary, and the depositary did not furnish a bond and subsequently failed."

We shall answer your two questions in the order submitted in your letter.

I.

Under the provisions of Sections 12184-12198, Article 9, Chapter 85, Revised Statutes of Missouri, 1929, a definite scheme and plan for the selection of county depositaries is set forth, and under the provisions of these sections it is made

the duty of the county court to select the depositary, or depositaries, in which the funds of the county shall be deposited.

Section 12198, R. S. Mo. 1929, of said Article 9, supra, provides as follows:

> "The county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, but nothing in this article shall release said treasurer from any loss resulting from any official misconduct on his part, or from responsibility for the funds of the county, until a depositary shall be selected and the funds deposited therein, or for any misappropriation of such funds in any manner by him."

The Supreme Court said in the case of Glaze v. Shumard, 54 S. W. (2d) 726, l. c. 728, as follows:

> "It is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise."

Therefore, under the provisions of Section 12198, supra, the county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, which necessarily means a depositary lawfully selected in accordance with the statutes in such cases made and provided.

It is, therefore, our opinion that, if a county depositary was duly and regularly selected and bond given and accepted in accordance with Article 9, Chapter 85, R. S. Mo. 1929, and amendments thereto, the county treasurer would not be responsible for any loss of the county funds through the negligence or failure of any depositary.

II.

We come now to the second question asked in your letter of request, that is, whether the county treasurer would be liable under his bond in the event that the county court designated a depositary and the depositary did not furnish a bond and subsequently failed.

The Supreme Court in the case of City of Fayette v. Silvey, 290 S. W. 1019, l. c. 1021, said the following:

> "* * * The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S. W. 631.
>
> "In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding

> the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

In the case of Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22, l. c. 24, 66 A. L. R. 1053, the Missouri Supreme Court in this leading case said:

> "The ruling in the University City Case was made in recognition of the rule followed in this State, and generally followed that the liability of the treasurer of a public corporation for its funds coming into his hands in absolute. State ex rel. v. Powell, 67 Mo. 395; 29 Am. Rep. 512; State ex rel. v. Moore 74 Mo. 413; 41 Am. Rep. 322; County of Mecklenburg v. Beales, 111 Va. 691, 69 S. E. 1032, L. R. A., (N. S.) 285. The rule is one founded upon considerations of public policy."

In the case of Everton Special Road District v. Bank of Everton, 55 S. W. 335, l. c. 336, the Supreme Court of Missouri stated:

> "In selecting a county depository the steps may be all regular up to the execution of a bond by the depository and then if the bond given does not substantially comply with the requirements of the statute, the depository selected is not the legal depository."

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2d) 751, l. c. 754, the Supreme Court of Missouri said:

> "As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to

> deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585."

The Springfield Court of Appeals followed the Huntsville Trust Company case in the case of Consolidated School District v. Citizens Savings Bank, 21 S. W. (2d) l. c. 788, and the Huntsville case is cited with approval in the case of White, County Treasurer, v. Greenlee, 49 S. W. (2d) 132.

Also, in the case of Boone County v. Cantley, Commissioner, 51 S. W. (2d) 56 l. c. 58, the Supreme Court further said:

> "A bank which has given a bond that does not comply with the provisions of Section 12187 R. S. 1929, regardless of the action taken by the county court with respect to it, is not a county depositary either in law or in fact. And upon the receipt of county funds by such a bank, under color of being a county depositary, a trust as to funds so deposited arises in favor of the county. Huntsville Trust Co., v. Noel, 321 Mo. 749 l. c. 757; 12 S. W. (2d) 751."

From the above and foregoing cases we find that a bank or trust company does not become a county depositary merely by being designated as such in an order of the county court. It must qualify as a depositary by giving the security prescribed by Section 12187, R. S. Mo. 1929, and amendments thereto, and where the statutory procedure in the selection of a county depositary has not been followed, by the giving

of the bond and the approval by the court, the bank in question is not the legal depositary of said county.

It is, therefore, the opinion of this Department that a county treasurer, depositing the county funds in a bank that has been designated as a county depositary but has not given the depositary bond as required by the statute, does so at his peril, and, in the event of the failure of said bank and the loss of the county funds thereby, he and his sureties become liable on his official bond.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

COUNTY TREASURER: Receives commission as custodian of school funds out of general revenue fund of the county treasury.

October 15, 1936.

10-16

FILED 17

Mr. Roscoe Claycomb,
Clerk of the County Court,
Carthage, Missouri.

Dear Sir:

This department wishes to acknowledge your letter of October 10th, wherein you state as follows:

> "It is our understanding that there is some variance in the different counties in the state as to the method of paying the County Treasurer his commissions for handling school funds. We understand that a number of them pay the Treasurer out of the School Funds themselves. In this county we have paid the Treasurer out of General Revenue. One of these methods of paying commissions is right and the other is wrong. We want to be right, and to have authority for our position so that we can justify it if criticized.
>
> "Will you please give us an opinion on the question, 'Should the County Treasurer of Jasper County be paid his commissions, allowed by law for handling school monies, out of the school monies protected by his services or should he be paid said commissions from the General Revenue Fund of the County?'"

Section 9266, R. S. of Mo. 1929, provides that the County Treasurer shall be custodian of school moneys, and provides for his compensation, thus:

> "The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts,

> until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, in which counties the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on his election, before entering upon the duties of his office, he shall give a separate bond, with sufficient security, in double the probable amount of school moneys that shall come into his hands, payable to the state of Missouri, to be approved by the county court, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over one-half the amount of the security available in the bond; and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent of all school moneys disbursed by him, and to be paid out of the county treasury."

The above underlined section is ambiguous, and we will have to look to other statutes relating to the same subject to help us determine whether the Treasurer receives the above compensation out of school funds in the county treasury or out of the general revenue of the county treasury.

A familiar principle of statutory construction is that it is proper to resort to other statutes relating to the subject to ascertain the intention of the Legislature. In the case of Hannibal & St. Joseph R. Co. v. Shacklett, 30 Mo. 550, l. c. 557, the court said:

> "* * * it is altogether consistent with the rules of construction to resort to other statutes, more specifically appropriated to the subject, for the purpose of ascertaining the intention of the legislature in the enactments of the general statute."

Section 9243, R. S. of Mo. 1929, dealing with county school funds, is silent as to appropriation of same for anything other than for the establishment and maintenance of free public schools in the several counties, thus:

> "It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

We find nothing in the above section which would indicate that county school funds may be used to compensate the County Treasurer for compensation for his services as custodian of school funds.

Section 9874, R. S. of Mo. 1929, provides what revenue the county court may appropriate, apportion and subdivide, thus:

> "The county courts of the several counties of this state are hereby authorized and empowered, at the first regular term of such court after the taking effect of this chapter, and at the May term every year thereafter, to appropriate, apportion and subdivide all the revenues collected, and to be collected, and moneys received and to be received, in the various counties in the state, for county purposes, in the following order:
>
> "I. A sum sufficient for the payment of all the necessary expenses that may be incurred for the care of paupers and insane persons of such county.
>
> "II. A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of such county.
>
> "III. A sum sufficient for the payment of the salary of all county officers, where the same is by law made payable out of the ordinary revenues of the county.
>
> "IV. A sum sufficient for the payment of the fees of grand and petit jurors, judges and clerks of elections, and fees of witnesses for the grand jury of the county.
>
> "V. A sum sufficient for the payment of the other ordinary current expenses of the county, not hereinbefore specially provided for, which shall be known and designated as the contingent fund of such county; which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year."

It is clearly evident from Section 9266, supra, that the Legislature intended that the County Treasurer receive compensation for his services as custodian of the county school funds.

Section 9243, dealing directly with the appropriation of county school funds, is silent on the subject of paying any compensation to the County Treasurer for such services. Section 9874, supra, specifically provides for the salary of county officers out of the general revenue of the county, and we are of the opinion that in light of the foregoing it was the intention of the Legislature that the funds of the county for schools be sacredly preserved intact for the maintenance and establishment of free public schools, and that the compensation of the Treasurer for the above purposes be paid out of the general revenues of the county treasury.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

PROBATE COURT: Refusal of administration as provided in Section 2, R. S. Mo. 1929.

8-24

August 5, 1936.

FILED 18

Honorable E. L. Colton
Probate Judge of Wright County
Hartville, Missouri

Dear Sir:

We acknowledge your request for an opinion dated July 22, 1936, which reads as follows:

> "I have a proposition confronting me about which I am unable to find a Court decision directly in point, and will appreciate it very greatly if you can assist me.
>
> "It involves a Refusal of Letters as authorized by Section 2 of R. S. for 1929. The widow of a decedent, with four children, three of whom are above 18 years of age and one of the age of 15 years, has made application for an order refusing administration under that section. There is considerable personal property belonging to the estate, livestock, etc., but upon her affidavit she lists the value of the personalty at $810.00. There are two separate tracts of real estate belonging to the estate, one being the homestead and the other an undivided one third interest in a farm recently heired by decedent, each of the probable value of $1,000.00. There are debts against the estate probably aggregating four or five hundred dollars. I realize that to a certain extent, the matter of making such an order is within my discretion. I am not however, clear on the proposition of whether or not the value of all of the estate should be considered in making a decision, or whether the real estate should be

excluded from consideration. I also realize that if such order is made, creditors would have a remedy out of the real estate heired by decedent, and for that reason am at a loss to know whether such order would be proper."

Section 2, R. S. Mo. 1929, provides:

"The probate court, or the judge thereof in vacation, in its or his discretion, may refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children under the age of eighteen years. Proof may be allowed by or on behalf of such widower, widow or minor children before the probate court or judge thereof of the value and nature of such estate, and if such court or judge shall be satisfied that no estate will be left after allowing the widower, widow or minor children their absolute property, he or it shall order that no letters of administration shall be issued on such estate, unless on the application of creditors or other parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow or minor children shall be authorized to collect, sue for and retain all the property belonging to such estate; if a widower or widow, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of eighteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suits."

A similar provision of statutory law in Missouri was construed by the Supreme Court to have no application to real estate, and in the case of Pidcock, v. Buffam, 61 Mo. 370, l. c. 372, the Court said:

> "The whole difficulty, or rather the monstrous injustice of this case as it stands, grows out of a mistake of the probate court, who supposed that the 15th section of the 8th article, of our administration law, applied to real estate as well as personal."

Since the probate court in Pidcock v. Buffam and under the statute then in force had no power to consider real estate as a condition precedent to orders denying administration on the real estate of deceased, we see no reason for the probate court in the instant case, under the statute above quoted, taking into consideration the real estate of deceased when determining that the estate of deceased does not exceed in value the legal sum allowed the widow by law preceding an order that no administration be granted.

The fact that the probate court makes an order refusing administration as provided in Section 2, supra, does not preclude a creditor from later going before the court, and on a proper showing having letters granted. In the case of Woolfolk v. Kemper, 31 Mo. App. 421, l. c. 424, the Court said:

> "Although the widow has proceeded under section two, Revised Statutes, an order of the probate court, setting the property left by the deceased purchaser over to her and doing away with administration, yet this proceeding is not binding on this plaintiff and does not prevent him from going before the probate court and on a proper showing, as a creditor, have letters granted on the estate. This he should do, and then proceed to have his claim allowed."

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

TAXATION: Respecting Attorneys fees in delinquent personal tax cases.

January 30, 1936.

FILED
19

Honorable Wallace Cooper
Prosecuting Attorney
Johnson County
Warrensburg, Missouri

Dear Mr. Cooper:

This office is in receipt of your request for an opinion on the following matters:

> "1. Is the delinquent tax attorney provided for in Section 9940 R. S. Missouri 1929, appointed in accordance with the provisions of Section 9952 as amended by the Laws of 1933 and entitled to the compensation therein provided?
>
> 2. Is the percentum fee agreed upon by the attorney, the collector and the County Court taxed as costs in case of suit and added to the judgment along with the $3.00 fee provided for, or is the $3.00 fee alone taxed as costs and the percentage to the tax attorney paid to him out of the amount paid in as taxes?
>
> 3. In case it is not necessary for the tax attorney to bring suit for the collection of delinquent personal taxes, is his fee which is based on an agreed percentage of the amount paid into the collector paid out of the delinquent tax paid or is this percentage added to the tax and the total amount paid by the delinquent personal taxpayer?"

We shall answer your questions in the order presented.

I.

DELINQUENT PERSONAL TAX
ATTORNEY APPOINTED AS PROVIDED IN SECTION 9952, R.S. Missouri 1929.

On January 3, 1935, this office issued an opinion to Jones & Wesner, Attorneys for the Collector of Pettis County, Missouri, wherein this conclusion was reached:

> "It is our further opinion that delinquent personal taxes should be collected under the provisions of Section 9940 R.S. Mo. 1929, and that into such section there should be incorporated that part of Section 9952 R. S. Mo. 1929 which reads:
>
> > 'and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court* * * to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed etc;* * * *"

The issue presented to this office in the Jones & Wesner opinion was the authority for employing a delinquent tax attorney to collect delinquent personal taxes. That opinion did not go into the question as to the compensation which should be allowed for the collection of delinquent personal taxes. Section 9940 R. S. Missouri 1929, provides in part:

> "* * *Said actions shall be prosecuted by attorneys employed as provided in Article 9 of this chapter of the general statutes, and the fees and compensation allowed in said article shall apply to the above actions:* * **"

Without question this phrase incorporates into Section 9940 the procedure established for the employment of delinquent tax attorneys and the fees and compensations allowed. The real issue is this, does such provision of Section 9940 incorporate the present provisions of Section 9952 into such section or did it incorporate the fees and commissions allowed at the time Section 9940 was first enacted. By referring

to the original enactment of what is now Section 9940 we find that on April 5, 1887 "An Act to provide for the collection of personal taxes" came into the statutory law of this state. The phrase under consideration as originally contained in said Act of 1887, page 242, Laws of 1887, read as follows:

> "Said action shall be prosecuted by attorneys employed as provided in Article VI of Chapter 145 of the General Statutes and the fees and compensation allowed in said article shall apply to the above actions; provided, however, that in no case shall the state, county, city or collector be liable for any costs, nor shall any be taxed against them or any of them."

Article VI of Chapter 145 of the General Statutes referred to above was a part of the Revised Statutes of Missouri 1879 of which Section 6836 was a part. This Section was the predecessor of our present Section 9952 and in respect to the issues here at hand stated:

> "* * *for the purpose of prosecuting suits for taxes under this act the collector shall have power, with the approval of the County* * *to employ such attorneys as he may deem necessary, who shall receive as fees in any suit such sum not to exceed ten per cent of the amount of taxes actually collected and paid into the treasury as may be agreed upon in writing and approved by the County Court* * * before such services are rendered, which sums shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided* * * *"

The compensation there provided was a straight commission of not to exceed ten per cent "in any suit". No suit fee of any kind was provided for. In 1921 this Section was amended so as to strike out the phrase "in any suit" and also to allow a suit fee of Three Dollars ($3.00) in cases where publication was not necessary and of Five Dollars ($5.00) in cases where publication was necessary. The problem confronting us is whether or not the Act of 1887 adopted the then provisions of Section 6836 in its existing form or whether the Act of 1887 contemplated the adoption of the provisions of Section 6836 together with any subsequent amendments.

Endlich on Interpretation of Statutes, Section 85, states:

> "An act adopting by reference the whole or a portion of another statute means the law as existing at the time of adoption and does not adopt any subsequent addition thereto or modification thereof."

Referring to this general rule the Supreme Court of this State in the case of Gaston vs. Lamkin, 115 Mo. 20, l. c. 33, stated as follows:

> "* * *The general rule governing in such cases seems to be that where one statute refers to another for rules of procedure prescribed by the former, the former statute if specifically referred to, becomes a part of the referring statute, and the rules of procedure prescribed by the earlier statute so far as they form a part of the second enactment, continue in force, although the earlier statute be afterwards modified or repealed. But when the subsequent statute, being a general one, does not refer specifically to a former statute for the rule of procedure to be followed, but generally to the established law, by some such expression as 'the same as is provided for by law' in given cases, then the act becomes a rule for future conduct to be found when needed by reference to the law governing such cases at the time when the rule is invoked.* * *"

In the case of Crohn vs. Telephone Company, 131 Mo. App. 313, the Court had for construction what is now Section 3264 which in part provides:

> "Damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 3262."

Subsequent to the enactment of Section 3264 Section 3262 was amended so as to provide an additional class of parties which could bring suit under that section. The Court held that Section 3264 adopted the pertinent parts of Section 3262 as they were written at the time Section 3264 was enacted, and that the subsequent amendment of Section 3262 could not extend the classes of parties which could take advantage of the provisions of Section 3264. The Court after referring to the general rules hereinbefore quoted, stated l. c. 321:

> "Under these rules, that part of section 2864 relating to parties and procedure became by adoption an integral part of section 2866 to the same extent as though it had been written into the latter statute and neither a subsequent amendment nor repeal of section 2864 could affect the referring section."

The foregoing decision is cited with approval and the theory further extended by the Supreme Court In Banc in the case of State ex rel. Great American Home Saving Institution et al. vs. Lee, 233 S. W. 20.

The Supreme Court of Iowa in the case of State vs. Beckner, 198 Nofthwestern 643 applied the rule in the case of a statute which provided that the defendant shall be punished as provided in the section relating to ravishment.

The Supreme Court of Montana in the case of Gustafson vs. Hammond Irregation District, 287 Pacific 640, stated the rule:

> "The rule is that 'the adoption of statute by reference is construed as an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent modification or repeal of the statute adopted.' 36 Cyc. 1152. This rule seems to be universal in the case of the adoption of a specific statute as here, as distinguished from the general law relating to a particular subject.* * * *"

In the instant case the Legislature referred to the law adopted as that "provided in Article 6 of Chapter 145 of the General Statutes" and allows fees and compensations as were "allowed in said article" though it did not refer specifically and solely to Section 6386 in so many words. Had it done so there could have been no question whatsoever in view of the rules heretofore laid down. However, as stated in the Gaston case supra:

> "The question in such cases always turns however upon the intention of the legislature in a given case."

What was the intention of the Legislature in the instant case? The presumption of course is that the statute is adopted in its form and that subsequent amendments will not effect the referring statute. The Supreme Court of Deleware in Perkins vs. Winslow, 133 Atl. 235, l. c. 236, stated:

> "While always a question of intention, in the absence of anything to indicate a contrary legislative intent, it is likewise true that provisions so adopted and read into other statutes will not ordinarily be affected by the repeal of the adopted statute,* * * * or by any subsequent changes by way of additions, modifications or otherwise in the adopted statute.* * * *"

Therefore, the presumption is that the Act of 1887 adopted the provisions of Article VI, Chapter 145 in its then existing state and especially the provisions of Section 6386 R. S. Missouri 1879, insofar as it prescribed the method of employing delinquent tax attorneys. However, the adopted statute did not end with

proviso that the fees and compensations allowed "in said article" shall apply to such actions. The "fees and compensations", had the legislature intended to apply only to attorneys fees, might likewise have been specifically identified by Section number rather than by Chapter number. However, the Legislature apparently intended to adopt other fees and commissions than those provided for the delinquent tax attorney, to-wit, those fees and compensations provided for in Section 6842 R. S. Missouri 1879, also a part of Article VI of Chapter 145 relating to the Circuit Clerk, the Sheriff and printer. So that it appears that the legislature, rather than enumerating several sections, referred to the article generally. In so doing, they specifically adopted the relative provisions of that Article as then existing as certainly as they would have done had they specifically enumerated the sections. In connection with this statement we have not overlooked the rule as stated in Lewis Sutherland's Statutory Construction, Second Edition, Section 405, wherein it is held:

> "There is another form of adoption wherein the reference is not to any particular statute or part of a statute but to the law generally which governs a particular subject. The reference in such case means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied."

In the Gaston case supra this rule was applied to a statute which provided:

> "The election herein provided for shall be held and conducted in the same manner and the returns thereof made to the County Clerk and the vote counted in all respects the same as in elections for state and county officers, as far as the laws in relation thereto are applicable.* * *"

Another example of the application of this latter rule is the case of State ex rel. Kell vs. Kramer, 160 N. E. 60, (Ill.). The adopting statute in that case provided:

> "As is now provided by law for intermediate registration."

The Supreme Court of Florida in the case of Williams vs. State, 125 So. 358, also applied the second rule relative to a statute which provided:

> "The fees of constables shall be the same as are allowed sheriffs for like services."

While the Courts have been uniform in holding that such general expressions as above referred to adopt the law together with subsequent changes, these cases are not applicable to the instant case as no general phrase was used in the Act of 1887 comparable to the phrase last above referred to. Rather the Legislature chose to designate the law by specific reference, to-wit, "Article VI of Chapter 145". By such specific reference and from a reading of the rest of the section there is no intention evident that any subsequent changes in Article VI of Chapter 145 were to affect the fees and commissions allowed the delinquent personal tax attorney.

There is one thing further that might be added. It was not until 1921 that any set suit fee was authorized. At the time a three dollar suit fee was allowed in cases where no publication was necessary a five dollar suit fee was allowed in cases where publication was necessary. These set suit fees are referable directly to the other provisions of Section 9952 authorizing suit for the collection of land taxes and especially to the provisions of that section providing for service by publication. It is but reasonable that these fees were meant and intended to apply only in case of suit brought for land taxes. No publication is provided for in personal tax suits, in fact, such is entirely unnecessary as the same facts that would justify an attachment suit being brought, with the attendant publication, authorize and require the County Collector to levy a distress warrant for the collection of the tax.

CONCLUSION.

In view of the foregoing it is the opinion of this office that the compensation allowable to delinquent personal tax attorneys is that prescribed by Section 6836 R. S. Missouri 1879, to-wit:

> "for the purpose of prosecuting the suits for taxes* * *the collector shall have power, with the approval of the county court, or in such cities the mayor thereof,

> to employ such attorneys as he may deem necessary, who shall receive as fees in any suit such sum not to exceed ten per cent of the amount of taxes actually collected and paid into the treasury as may be agreed upon in writing and approved by the County Court, etc.* * *"

II.

PERCENTAGE COMMISSION TAXED AS COSTS AND ADDED TO JUDGMENT.

By comparing the Act approved April 5, 1887, page 422, Laws of Missouri 1887, with Section 9940 R. S. Missouri 1929, it will be seen that both contain the provision

> "that in no case shall the state, county, city or collector be liable for any costs, nor shall any be taxed against them or any of them,"

and that the provisions of Section 6836 R. S. Missouri 1879 and Section 9952 R. S. Missouri 1929, are identical in that they provide:

> "which sums shall be taxed as costs in the suit and collected as other costs."

By virtue of these specific provisions two things are evident; first, that the attorney fee is to be taxed as costs as any other costs, and second, that it must be collected from the taxpayer and cannot be charged to the state or county, etc. This issue is directly passed on in the case of State ex rel. Bauer vs. Edwards, 144 Mo. 467. The Supreme Court stated, l. c. 471:

> "It is complained of the judgment, however, as error, that the amount of the attorney's fees is included in the judgment enforcing the lien against the lands when, as is contended, the statute only provides that the attorney employed to prosecute the suit shall receive as fees in such suit 'such sum not to exceed ten per cent of the amount

> of taxes actually collected and paid into the treasury, as may be agreed upon in writing, and approved..... in such cities by the mayor, before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs.' R. S. 1889, sec. 7681. From which it is argued that the attorney can never have judgment for his fees, until thejudgment has been collected and paid into the treasury. This conclusion can not be correct, and results from the reading of a part only of the statute on this subject, when the whole of it should be read and considered together. The statute provides not only that such fees 'shall be taxed as cost and collected as other cost' (as quoted in the brief), but that that sum 'shall be taxed as costs in the suit and collected as other costs.' And that the court 'shall decree that the lien of the State aforesaid be enforced and that the real estate or so much thereof as may be necessary to satisfy such judgment, interest and costs be sold, which shall be executed as in other cases of special judgment and execution.' R. S. 1889, sec. 7683. Thus plainly showing that the attorney's fees are to go into thejudgment and be thereby collected as other costs in the suit. While the judgment in the present case is somewhat informal in that the attorney's fees are not first taxed as costs, and judgment rendered form them as costs, but directly as attorney's fees, the result is the same and in no way injurious to the defendant's interest, and for such informality the judgment should not be reversed."

From the above decision it is certain the fees are to be included in the judgment as costs but in this connection we direct attention to the case of State ex rel. Gottlieb vs. Wilson, 174 Mo. 505. In this case it is held that in case the sum received

to apply on the judgment is insufficient to pay the full amount of the judgment and costs, the costs other than the attorney's fee and collector's commission are to be paid in full and such attorney's fee and collector's commission may only be calculated on the amount remaining which is actually paid into the treasury of the county or other tax receiving body. This case follows the ruling laid down in the early case of State ex rel. Kemper vs. Smith, 13 Mo. App. 421. As a result the collector's commission and the Attorney's fee are only to be calculated upon the sum actually collected and paid into the treasury.

In view of the construction which we have heretofore placed upon Section 9940 it is evident that the amendment of 1921 allowing suit fees of three and five dollars has no application to personal tax suits and such fees are not to be collected.

CONCLUSION.

It is therefore the opinion of this office that the percentage attorney fees agreed upon between the collector and the delinquent tax attorney and approved by the county court are to be taxed as costs in the case; that the three and five dollar fees provided for in Section 9952 R. S. Missouri 1929 have no application to suits for delinquent personal taxes; and that the percentage attorney fees, although taxed as costs, can only be collected, based upon the amount of money actually paid into the treasury.

III.

ATTORNEY ENTITLED TO NO FEE UNLESS SUIT BROUGHT.

We must once more direct attention to Section 3686 R. S. Missouri 1879 and to the following phrase:

> "who shall receive as fees in any suit such sum not to exceed ten per centum of the amount of taxes actually collected and paid into the treasury* * *and no such attorney shall receive any fee or compensation for such service except as in this section provided."

It is apparent from this phrase that the ten per cent allowance to the delinquent tax attorney is only allowable in "any suit" and that the delinquent tax attorney may not receive any compensation except that specifically provided. No compensation is "provided" except "as fees in any suit". A suit is generally considered as any proceeding in a court of Justice. Bouvier's Law Dictionary. The effect of the phrase "in any suit" is evident when we consider that by the amendment of 1921, this phrase was removed. Page 676, Laws of Missouri 1921. The Legislature had a definite intention in removing this phrase. By removing this phrase, it was intended to allow the commission on land taxes whether suit was filed or not. Such has been the opinion of this office, but we must remember that the compensation allowed to the delinquent tax attorney for personal tax collections is to be determined by the condition of the law existing at the time of the adoption of Section 9940, and that while such amendment of 1921 may have changed the fees allowable for the collection of real estate taxes, it did not change the law in respect to the fees allowable for the collection of delinquent personal taxes.

CONCLUSION.

It is therefore the opinion of this office that delinquent tax attorneys are not entitled to charge any commission or feeson delinquent personal tax bills unless and until suit is filed thereon.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM

SCHOOLS: Under Section 9226 only majority vote is required to put into effect proposition solely for purpose of repairing and furnishing school

5-11

May 8, 1936

FILE 19

Mr. L. H. Coward, Superintendent
Department of Public Schools
Greene County
Springfield, Missouri

Dear Sir:

We acknowledge receipt of your request for an official opinion under date of April 15, 1936, which reads as follows:

> "Questions have arisen here time after time and especially since the annual school meeting this year concerning the interpretation of Sec.9226, as to its implication for voting purely a repair and furnishing fund. Therefore, we wish to know if a district at its annual meeting votes a 'building fund,' under which heading it has to be submitted each year to the County Clerk on a form designated 'Estimate,' solely for repair and furnishing should be voted by a majority or by a two third majority. It seems the first part of Sec. 9226 indicates a two third majority while the latter part or the 'Provided' indicates only a majority.
>
> "An immediate opinion will be appreciated as it is important we secure this information."

Section 10797, Revised Statutes Missouri 1909, as enacted, was in substance the same as what is now known as Section 9226, Revised Statutes Missouri 1929, prior to the enactment of several amendments thereto.

This section provides as follows:

> "The board of education or directors of any school district in this state shall, whenever in their judgment it becomes necessary, or they be requested, by a petition of ten taxpayers of any such school district,to increase the annual rate of taxation for the purpose of paying for school building sites, whether the same have been purchased or condemned, for buying or erecting school buildings in such districts, or repairing or furnishing such buildings, determine the rate of taxation necessary to be levied within the maximum rates prescribed by the Constitution, and as therein limited for such purposes, and shall submit to the voters of such school district, at an election to be by such board called and held for that purpose, at the usual place for holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board for any of the purposes mentioned in this section, due notice having been given as required by Section 10844, and if two-thirds of the qualified voters of such school district shall vote in favor of such increase for the purpose aforesaid, the result of such vote, and the rate of taxation so voted, shall be certified by the secretary or clerk of such board to the clerk of the county court of the proper county,who shall, on the receipt thereof, proceed to assess the amount so regurned for any or all of the purposes mentioned in this section on all the taxable property both real and personal, of such school

> district, as shown by the last annual assessment for state and county purposes, including all statements of merchants, as is provided by law. (R. S. 1899, Sec. 9778, amended, Laws 1909, p. 770.)"

This section was amended by the General Assembly in 1911 as shown on page 397, Laws 1911, by inserting the following words "or of such city, town or village forming a school district, voting at said election," after the word "district" and before the word "shall" in line fifteen.

This Act of 1911 was later amended in 1917 as found on pages 501-2, by inserting the word "building" in line seven after the following words: "or for building, repairing and maintaining bridges over running streams."

This Act was further amended in 1919 as shown on page 699, Laws of 1919, by adding at the close of said section the following words:

> "Provided: That when the proposition to be voted on refers only to repairing or furnishing, or both repairing and furnishing such school building, the proposition shall be deemed to have been carried at the election if a majority of the votes cast are cast in favor of the proposition."

By comparison the law now known as Section 9226, Revised Statutes Missouri 1929, is the same as amended in 1919, and provides:

> " The board of education or directors of any school district in this state shall, whenever in their judgment it becomes necessary, or they be requested, by a petition of ten taxpayers of any such school district,to increase the annual rate of taxation for the purpose of paying for school building sites, whether the same have been purchased or condemned, for buying or erecting school buildings in such districts,or repairing or furnishing such buildings,*(or

for building, repairing and maintaining foot bridges over running streams) determine the rate of taxation necessary to be levied within the maximum rates prescribed by the Constitution, and as therein limited for such purposes,and shall submit to the voters of such school district,at an election to be by such board called and held for that purpose, at the usual place for holding elections for members of such board,whether the rate of taxation shall be increased as proposed by said board for any of the purposes mentioned in this section, due notice having been given as required by section 9283, and if two-thirds of the qualified voters of such school district *(or of such city,town or village forming a school district, voting at said election), shall vote in favor of such increase for the purposes aforesaid, the result of such vote, and the rate of taxation so voted, shall be certified by the secretary or clerk of such board to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess the amount so returned for any or all of the purposes mentioned in this section on all the taxable property, both real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants, as is provided by law: *(Provided, that when the proposition to be voted on refers only to repairing or furnishing, or both repairing and furnishing such school building, the proposition shall be deemed to have been carried at the election if a majority of the votes cast are cast in favor of the proposition.) (R.S. 1919,sec.11152.) "

The fundamental rule in the construction of a statutory provision is to ascertain the legislative intent expressed therein. State ex rel. Consolidated School District Number 1 v. Hackmann 258 S. W. 1011; 302 Mo. 558.

The last amendment provides that a majority of votes is sufficient to carry an election when the proposition to be voted upon refers to repairing and furnishing a school building. This amendment impliedly repealed the former statute enacted only insofar as pertaining to the required number of voters required to carry a proposition relative to repairing and furnishing a school building.

It is a fundamental rule of construction that a new statute is amendatory and repeals a whole one by implication only to the extent of the irreconcilable repugnancy between the two. State ex rel. Holladay v. Rinke, 121 S. W. 159.

Section 9284, Revised Statutes Missouri 1929, fortifies this contention as found in subdivision 9, which reads as follows:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes case. * * * * To determine, by ballot, the rate to be levied upon the one hundred dollars' assessed valuation necessary to purchase a site, erect a schoolhouse thereon and furnish the same, as provided for in section 9226. * * * * * "

In Jacobs v. Cauthorn 293 Mo. 154, l. c. 158-9, the Court said:

> "As will appear from the foregoing statement the chief complaint of appellants in their bill was directed against the '25 cents building and repair fund,' and mainly on account of the manner of authorization. Their complaint that the proposition should have been supported by a petition of ten taxpayers of the district

> is not tenable, as Section 11152, Revised Statutes 1919, specifically grants to the board of directors the right, when such board deems it necessary, to submit the question of increase of the annual rate of taxation for repairing and furnishing school buildings, and the same section permits said increase for those purposes upon a vote of a majority of those qualified voters casting their votes on the proposition. The notice of said election and the ballots used sufficiently comply with the law as it does not appear that any one participating in said meeting was deceived by said notice or confused in the matter of casting an intelligent ballot. This contention must be ruled adversely to appellants, and we also hold that the board of directors reasonably submitted its estimate to the county clerk."

Section 11152, Revised Statutes Missouri 1919, is the law as amended in 1919 and now known as Section 9226, Revised Statutes Missouri 1929.

CONCLUSION

From the foregoing, it is the opinion of this department that only the majority of the qualified voters of a school district are required to carry a proposition solely for the purpose of repairing and furnishing a

school building.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

ARH:
OWN:LC

OFFICERS:
LIMITATIONS: Section 863 R. S. Mo. 1929 applies to actions against an officer to recover excess salaries, absent fraud.

February 5, 1936 2-15

FILED 20

Mr. Brevator R. Creech
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "I would like to obtain an opinion from your office concerning the matter of applicability of the Statute of Limitations respecting claims against County officials for excess salaries paid to and received by them. That is, whether or not the three year statute, Sec. 863, R. S. 1929 applies."

Section 863, Revised Statutes Missouri 1929, about which you inquire, provides:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is

given to the party aggrieved, or to such party and the state."

The case of Putnam County v. Johnson 259 Mo. 73, we think, fully answers your question. The Court, passing upon the identical question, at l. c. pages 81, 83, 84 and 85, stated the law as follows:

"The question now material is, whether these counts state a cause of action which is barred by the three-year statute. Plaintiff says not, and defendant contra. The statute, Revised Statutes 1909, section 1890, reads:

"'Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of any official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to a party aggrieved, or to such party and the State.'

"This question requires a statement of the items sued for in the count named, to the end that we may see whether or not they fall within this statute. These items, fully set out in the first count of the petition, are as follows:

" 'Item 1. The sum of one thousand three hundred and six dollars and ninety-one cents, being the amount wrongfully exacted and obtained from said county and charged for making out and computing the tax books, the defendant having wrongfully charged said county on a basis of sixty-five words and figures for each name on said tax books, instead of charging on a basis of forty words and figures for each name appearing thereon, the proper and correct basis as shown by actual count.

" ' Item 2. The sum of seventy-eight dollars and eleven cents, being the amount wrongfully charged exacted and retained as back salary for previous years, and to which the defendant was not entitled."

* *

"More than three years had elapsed,and if these items come within the purview of the statute above quoted, and such statute has not in some way been tolled under the facts pleaded, then the demurrer was properly sustained as to these counts. Plaintiff urges in the brief that these items were not received by the defendant 'in virtue of his office', but that they were fraudulently received. To the one class of cases the three-year statute applies, whilst as to the other the five-year statute would apply.

"We have fully set out the petition. The wording of it is not such as to justify us in saying that the actions in the first and second counts of the petition stated, are grounded upon fraud. If this was the view of the pleader, then he failed to allege facts sufficient to state a cause of action. (Shelby Co. v. Bragg, 135 Mo. 291.) In the Bragg case, Macfarlane, J., said:

" 'It cannot be said that the evidence of the facts constituting plaintiff's cause of action was conceded or suppressed. The evidence all existed upon the official books and records of the office open to the examination of the court. The expert accountants who afterward made an examination encountered no difficulties in making an account of fees collected. They reported no destruction of books, or the suppression or concealment of no

fact which could prevent an accurate statement being made.

"'It is insisted that the duty of this officer and his relation to the county court was such that the latter had the right to rely implicitly on the correctness of these statements and that making a statement which did not fully and truthfully account for all fees collected is such a fraudulent concealment of the facts as would delay the running of the statute. But the county court is required to examine the statement and see that they are correct before approving them; it was not intended that they should accept as true any statement the officer should make. The evidence by which the truth could have been ascertained was at hand and open to their examination. Indeed, the statements themselves did not all purport to be accurate; they do not pretend to give an itemized account of the fees collected and from whom; they virtually refer the court to the records of the offices for the evidence.

"'The county court is given the power to audit the accounts of these officers and it is made their duty to examine statements made by them and, if necessary,to hear the evidence of witnesses. A mere examination of the statements is not a proper performance of their duty. They should see that the statements are correct. This is particularly so when the statements on their face, as in this case, are not such as the law requires. It cannot be said that the county court was ignorant of facts which were open to its examination, and which it was its duty to know.'

"It is true that Judge MacFarlane was discussing the tolling of the Statute of Limitation by fraudulent acts, but he says much that is of interest here. The county court passes upon and allows charges of the county clerk. To state a good cause of action grounded upon fraud, and fraud practiced must be pleaded. This is as much requisite in

a position grounded upon fraud, as it is a requisite to show fraud for the purpose of tolling the statute. We do not believe the pleader intended to ground the action upon fraud, but if he did, the demurrer was well taken, because the facts alleged were insufficient. The five-year Statute of Limitation has no application to the first and second counts.

"But plaintiff says the three-year statute, supra, has no application, because the items of cash named were not received by defendant 'in virtue of his office.' We do not agree to this view. If they were not received 'in virtue of his office' how were they received? We can conceive of no other way or capacity in which they were received. They may have been wrongfully and, speaking from the statute, unlawfully received, but they were evidently received 'in virtue of his office.' In other words they were received as an officer, not as an individual or agent. Take the alleged overcharge for the tax books. Whether the defendant was allowed or retained the proper or the improper amount for such service, yet whatever amount he did retain for such services was retained by him officially, for official work, and was received, had, held and retained 'in virtue of his office' as used in the statute.

"If these two counts (first and second) do not plead actions grounded upon fraud, as we have held, and if they do seek to recover from defendant money wrongfully held by him, but received by him 'in virtue of his office,' then the three-year Statute of Limitations applies, and the causes of action stated in these two counts are barred by such statute. Upon this theory the trial court was right in sustaining the demurrer as to these counts."

CONCLUSION

In view of the above, it is the opinion of this department that excess salaries paid to and received by a county official are received by him 'in virtue of his office,' and, absent fraud on the part of such official the three-year statute of limitations applies, and an action against such official to recover excess salaries paid to him more than three years before the bringing of the action would be barred by such statute.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JET:LC

OFFICIAL BONDS: Premium on official bond of State Labor Commissioner cannot be paid out of appropriation of Department of Labor & Industrial Inspection.

3-30

March 11, 1936.

FILED
20

Mrs. Mary Edna Cruzen,
State Labor Commissioner,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This department is in receipt of your letter of March 9 requesting an opinion as to the following:

> "Under section 13169, it is necessary that I furnish the State of Missouri bond in the amount of $20,000.
>
> "I would like to know whether or not payment of premiums covering this bond cannot be taken out of the appropriation made this department for operating and other expenses. * * * "
>
> Section 13169, R.S. Mo. 1929 provides:
>
> "Before said commissioner of labor and industrial inspection shall enter upon the duties of his office, he and the deputy commissioners provided for by this article shall be required to take and subscribe to an oath of office and the commissioner shall give a good and sufficient bond to the State of Missouri in the penal sum of twenty thousand dollars, to be approved by the attorney-general as to form, and by the governor as to sufficiency, conditioned upon the faithful

> performance of the duties of his office, and that he will render an honest and accurate accounting of all funds which may come into his hands through the performance of his official duties, and said commissioner shall be held liable on his official bond for any defalcations of any of his deputies, agents, assistants, or other employes."

The appropriation for the Department of Labor and Industrial Inspection (Laws of Mo. 1935, p. 100) provides:

> "There is hereby appropriated out of the State Treasury, chargeable to the State revenue fund, the sum of Ninety-five Thousand Three Hundred Dollars ($95,300.00) to pay the salaries, wages and per diem of the officers and employees, and other expenses of the Department of Labor and Industrial Inspection, as follows:
>
> A. Personal Service:
> Salaries of the Commissioner, chief clerk, statistician, deputy commissioners, stenographers, inspectors and janitors.....$75,000.00
>
> B. Additions.....500.00
>
> D. Operation:
> General expenses, consisting of communication, printing and binding, travel, other general expenses.....18,800.00
>
> Total payable out of State Revenue Fund.....$95,300.00"

It will be noticed that Section 13169, supra, does not provide for the payment of the premium on the required bond, nor does the Appropriation Act make any provision for the payment of

the same.

CONCLUSION

It is the opinion of this department that premiums on official bonds may only be paid by the State of Missouri where the statute requiring the bond provides for the payment of the premium by the State, and the appropriation act for the department wherein the official bond is required of some official makes provision for the payment of the premium on said bond.

In this connection it must be remembered that in many instances (and it is particularly made so by Sec. 13169, supra), the giving of the bond is a condition precedent to qualifying for the office, and unless otherwise provided by statute, can be viewed in no other light than the personal obligation of the office holder.

We have recently ruled on a question substantially similar to your request and are enclosing copy of said opinion, which we believe fully answers the question presented by you.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH
Encl-1

EMPLOYMENT AGENCIES: Mandatory to issue license when all statutory requirements have been met.

But see 315 Mo. 681

5-11

May 1, 1936.

FILED 20

Mrs. Mary Edna Cruzen, Commissioner,
Department of Labor and Industrial Inspection,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This Department acknowledges receipt of your request for an opinion under date of April 28, 1936, as follows:

> "The question has arisen whether or not it is mandatory upon me to issue a license to an employment agency provided they send in the proper bond and fee.
>
> "Will you please tell me if I have any discretion as to whether or not the employment agency is needed if proper bond and fee is sent me, or should I issue license regardless."

Section 13190, R. S. Mo. 1929, provides in part as follows:

> "No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection. Such license fee in cities of fifty thousand population and over shall be fifty dollars per annum, and in all cities containing less than fifty thousand population, a uniform fee of twenty-five dollars per

annum. Every license shall contain a designation of the city, street and number of the building in which the licensed party conducts said employment agency. The license, together with a copy of sections 13190 to 13193, inclusive, shall be posted in a conspicuous place in each and every employment agency. The commissioner of labor and industrial inspection shall require with each application for a license a bond in the penal sum of five hundred dollars, with one or more sureties, to be approved by said commissioner and conditioned that the obligors will not violate any of the duties, terms, conditions, provisions or requirements of said sections. The said commissioner is authorized to commence action or actions on said bond or bonds in the name of the state of Missouri for any violation of any of its conditions, and he may also revoke, upon a full hearing, any license, whenever, in his judgment, the party licensed shall have violated any of the provisions of said sections. It shall be the duty of every licensed agency to keep a register in which shall be entered the names and addresses of every person who shall make application for help or servants, and the names and nature of such employment for which such help shall be wanted. Such register shall, at all reasonable hours, be open to the inspection and examination of the commissioner of labor and industrial inspection and his agent, or agents, deputies or assistants. * * * Any licensed agency shall not publish or cause to be published any false or fraudulent notice or advertisement, or give any false information or make any false promise concerning or relating to work or employment to any one who shall apply for employment, and no licensed agency shall make any false entries in the register to be kept as herein provided. No person, firm or corporation shall conduct the business of any employment office or agency in, or in connection with, any place where intoxicating liquors are sold."

In the case of State ex rel. Jones v. Laughlin, 73 Mo. 443, l. c. 449, the court said:

> "The proper rule of construction in cases of this sort, as we understand it, is that may is to be held as meaning shall whenever the statute requiring construction relates to a power conferred on public officers, concerning the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner for the sake of justice and the public good."

In the case of State v. Stoddard, 189 N. W. (Neb.) 291, l. c. 300, the court said:

> "The powers conferred upon public officers are generally construed as mandatory though the language may be permissive, where the public are concerned in their execution or where they affect the rights of third persons. 22 R. C. L. 457, Sec. 116. As a matter of law, it is obligatory to do whatever act is authorized to be done, not necessarily for their own benefit, but for the benefit of others. * * *
>
> "'Statutes imposing duties and conferring powers on officers are either mandatory or directory. Permissive words in a statute are construed as mandatory where the exercise of the power granted is necessary to protect the public interest or the rights of third persons.' 29 Cyc. 1432."

And in the case of United States Sugar Equalization Board v. P. De Ronde & Co., 7 Fed. (2d) 981, l. c. 986, the court said:

> "What a public officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do."

There can be no question but that Section 13190, supra, confers upon the Labor Commissioner the power to issue a license

for the maintenance of an employment office or agency for hire on the fulfillment of certain requirements, and we assume from your letter that these statutory requirements have all been met. The duty to issue licenses, however, is not expressed in either permissive or mandatory language, but we are of the opinion that even if permissive words were used, same would have to be construed as mandatory since it affects the rights of third persons, in this case the party seeking to obtain a license and who has met all the necessary requirements.

In view of the language of the foregoing cases declaring that "what a public officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do", we are of the opinion that you have no discretion as to whether or not the employment agency is needed, and that it is mandatory upon you to issue a license to the employment agency provided they have met all statutory requirements.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

COUNTIES: County Court can appropriate $3,000 for the establishment of State Employment Bureau in St. Louis County for the purpose of establishing employment in connection with the rules and regulations of the Federal Relief Administration, Washington, D. C., said appropriation being for the purpose of indirectly relieving the county from maintaining and relieving the indigent poor as it is compelled to do under Sections 12961 and 12950, R. S. Mo. 1929.

July 23, 1936.

7-23

FILED
20

Mrs. Mary Edna Cruzen,
Director, Missouri State Employment Service,
Jefferson City, Missouri.

Dear Mrs. Cruzen:

This department is in receipt of your letter of July 21st wherein it is requested that the opinion rendered on March 4, 1936, to Honorable John E. Mooney, County Counselor, Clayton, Missouri, be reconsidered from the angle which you present in your letter. Your letter is as follows:

> "The Missouri State Employment Service will be unable to take care of registration of relief applicants unemployed after December at Clayton, due to failure of St. Louis County to make an appropriation for the maintenance of the employment service. A ruling was issued by your office last March, indicating that the County did not have power to appropriate such funds.
>
> "Since the date of your ruling, a new condition has presented itself. Due to regulation issued in Washington, some provision must be had for proper registration of these relief and non-relief applicants. Federal projects will not give them employment unless they are registered at the employment office. If they are not assigned through the Missouri State Employment Service in Clayton, they must be given relief by the County.
>
> "The attached memorandum makes the situation clear. I respectfully request that, due to these changed conditions, the opinion of March 4, 1936, be withdrawn, and that St. Louis County be permitted to make the needed payment."

Referring to the opinion of March 4th to Mr. Mooney, the question submitted was as follows:

> "I have been instructed by the county court to ask you for an opinion in the legality of issuing a county warrant in the sum of three thousand dollars made payable to the State Employment Bureau for the purpose of maintaining the bureau."

As an abstract proposition of law, we held in the opinion to Mr. Mooney that a warrant could not be issued in the sum of $3,000 to the State Employment Bureau for the reason that the County Court was without statutory authority, either express or implied. What we said in that opinion, we think, was the correct conclusion of the law. However, your letter presents the matter on an entirely different theory for the appropriation.

You state in your letter that since the date of our ruling, a new condition has presented itself. Due to regulation issued in Washington, some provision must be had for proper registration of these relief and non-relief applicants, and we shall treat the same from the angle that the proposed $3,000 is for the relief of the poor of St. Louis County.

Our present view of the matter, if we correctly interpret the trend of your letter, is that the County Court of St. Louis County, by appropriating the $3,000 and enabling the county to comply with the provisions or regulations from Washington, will avoid and relieve itself of aid to the poor, which otherwise it would be compelled under the statutes to make provision for the indigent poor and those unable to care for themselves.

Pursuing the matter further from this angle, it is the duty of the County Court to provide for the support of the poor. Section 12961, R. S. Mo. 1929:

> "The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate from other funds, and pay the same out on the warrants of their county courts."

Likewise Section 12950, R. S. Mo. 1929, which is as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

The power and authority of a county to care for its poor caused by the depression has received a liberal attitude by the Supreme Court of the State of Missouri. In the very recent case of State of Missouri ex rel. Gilpin, et al., Judges of the County Court of Buchanan County vs. Forrest Smith, State Auditor, No. 35,095 (not yet published), the court held that it was legal for the County of Buchanan to authorize the issuance of $300,000 in bonds, said bonds to be known as Poor Relief Bonds. The court further held that under Section 12 of Article 10 of the Constitution of Missouri, a county may issue bonds without express statutory authority, provided that the bonds are issued only for county public purposes, and that the Poor Relief Bonds in question were issued for that purpose, provided that two-thirds of the voters of the county assent to such a proposition. In discussing the county's duty to support and relieve the poor, Judge Tipton says:

"We are of the opinion that it is the duty of a county to support the poor who are within its boundaries. Section 12950, R. S. Mo. 1929, is as follows:

"'Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants.'

"'An examination of the Revised Statutes of Missouri 1929 clearly shows that poor relief is a "public purpose" and a governmental duty because by sections 12950 and 12952 (Mo. St. Ann. secs. 12950, 12952) counties are authorized to spend money in support of the poor; by section 9986 (Mo. St. Ann. Sec. 9986) a county pauper fund is provided; by section 12058 and 13942 (Mo. St. Ann. secs. 12058, 13942) county poor houses and county hospitals are maintained; section 9697 (Mo. St. Ann. sec. 9697) gives authority to educate poor children that are blind or deaf; section 12961 (Mo. St. Ann. sec. 12961) directs the county court to set aside, out of its annual revenues, a definite sum for the support of the poor; article 1, chapter 90, creates a state board of charities and defines its functions; section 12930 (Mo. St. Ann. sec. 12930) requires this board to supervise public relief to the poor; ....'....

"'The good of society demands that when a person "is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood" he is entitled to be supported at the expense of the public. "It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important." "So the fact that a person's want is the result of a gross intemperance does not prevent him from securing relief as a pauper." "An ablebodied man, who can, if he chooses obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men." 21 R. C. L. 705, 706. It necessarily follows that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support, is entitled to public relief.' (Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 981.)

"We think that these bonds, which provide for the care of the poor of Buchanan County, are for a county public purpose."

CONCLUSION

Bearing in mind that the proposed warrant of $3,000 is for the purpose of complying with the rules and regulations promulgated by Washington, D. C., in order that the county may be relieved of supporting many persons who if not given employment under the Federal Emergency Relief Administration, the relief, maintenance and support of such persons will fall by statute on the county itself, we are of the opinion that the proposed $3,000 is for a county public purpose, and that the

same constitutes indirectly sums set apart from the revenues of such county for the annual support of the poor as shall seem reasonable, and that the same constitutes the carrying out of the duty of the County Court in Section 12950 for the relief, maintenance and support of poor persons by a county of which they are inhabitants.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:HR

INTOXICATING LIQUOR - License should not be issued to partnership unless all the members have the required qualifications.

August 19, 1936

8-21

FILED
20

Honorable Lee E. Crook
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "I have been called upon to construe Section 27, Liquor Laws of 1935, page 21, of the pamphlet sent out by the Department of Liquor Control and Section 43-A, page 31, same subject. The real question at issue is a co-partnership of two individuals have made application for a license in Appleton City, Missouri, to sell liquor in the original package, one of them is of good moral character, a qualified legal voter and tax paying citizen of Appleton City, the other member of the co-partnership is a non-resident of St. Clair County and does not meet the qualifications required under Section 27. Can a license be legally issued to this co-partnership?"

Section 27 of the Liquor Control Act, about which you inquire, reads as follows:

> "No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the

> managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village; and no person shall be granted a license or permit hereunder whose license as such dealer has been revoked, or who has been convicted, since the ratification of the Twenty-first Amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs in his business as such dealer, any person whose license has been revoked or who has been convicted of violating such law since the date aforesaid."

Section 43-a defines "person" as used in the Liquor Control Act to mean and include any individual, association, joint stock company, syndicate, co-partnership, corporation, receiver, trustee, conservator, or other officer appointed by any State or Federal Court.

That a partnership may not engage in the sale of intoxicating liquor without first obtaining a license authorizing it to do so is evident by Section 18 of the Liquor Control Act, which provides:

> "It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as herein defined, in any quantity, without taking out a license."

Your question, as we understand it, is whether or not all the members of a co-partnership are required to have the qualifications for a license specified in Section 27, supra. A partnership, strictly speaking, is not a legal entity, and the members thereof are severally as well as jointly liable for the acts of any of the co-partners.

In construing the dramshop law, which restricted the granting of a dramshop license to a law abiding,

assessed, taxpaying male citizen above twenty-one years of age, the court, in the case of State ex rel. v. Scott, 96 Mo. App. l.c. 624, said:

> "There is no authority to grant a license to a partnership as such, in the partnership name, as was done in this instance. Where the application is made by a co-partnership the application should be made in the name of the individual members of the partnership. Each member should sign the application and he should fill the statutory requirements, that is, he should be a law-abiding, assessed, taxpaying, male citizen above twenty-one years of age, and the license should be issued to the individuals doing business under the partnership name."

We think the case of State ex rel. Reider v. The Moniteau County Court, 45 Mo. App., 387, further supports the contention that all the members of a partnership should have the necessary qualifications before obtaining a license. The court, at l.c. 396, said:

> "We discover no reason why a license, in the discretion of the county court, should not be granted to two persons, if they jointly apply and are jointly petitioned for. The character of the applicants can be ascertained when applying jointly as when singly. By the terms of the statute the license is confined to one place and one dramshop; allows but the one business, is not transferable, and I can perceive of nothing in the objection which is against the policy of the dramshop law. It may be suggested that the same section concerning singular and plural numbers also declares that persons shall include bodies corporate as well as individuals; but here the saving clause (above quoted) of the repugnancy to such construction would doubtless apply; for difficulties in such case as to proof

of character and punishment for violation of the law would present themselves."

CONCLUSION.

In view of all the above, it is the opinion of this department that a license to sell intoxicating liquor should not be issued to a partnership unless all of the members thereof have the qualifications specified in Section 27 of the Liquor Control Act. It is our further opinion that a license should not be granted to a partnership as such in the partnership name, but should be issued to the individuals composing the partnership and doing business under the partnership name.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:FE

PETIT JURY: How summoned
CIRCUIT CLERK: One summons for petit jury

September 14, 1936.

9-15

FILED
20

Mr. Perle Crawford, Clerk
Macon County Circuit Court
Macon, Missouri

Dear Mr. Crawford:

We have your request for an opinion of this office reading as follows:

> "I am writing you in regard to the proper way to summons a Petit Jury, there is a question raised here as to the proper way, the way that I have done as clerk by a summons to the sheriff and a certified copy to each petit juror."

That portion of the statute involved in this matter, Section 8758 Revised Statutes Missouri 1929, is as follows:

> "And the clerk of the court for which the jury is drawn shall immediately thereafter issue a summons to the sheriffof the county, directing him to summon the persons thus drawn as petit jurors to appear on such day of the term of such court as shall be named in such summons by the clerk of said court to serwe as petit jurors; and it shall be the duty of the sheriff to make service of such process at least ten days before the first day of the term of court for which such persons are drawn, which summons shall be served by reading the same to the person so summoned or by leaving a copy of the summons at his usual place of abode with some member of the family over fifteen years of age, except in such cases as may be hereafter provided."

The clerk referred to in the above statute is the Circuit Clerk. He shall issue a summons as in any other matter, and when delivered to the Sheriff he shall serve it as provided in the above statute. Only one summons is necessary, which shall include the names and addresses of all jurors. It is not necessary for the clerk to make more than one summons. If the Sheriff is unable to locate the petit juror so as to serve him by reading the summons to him, he may obtain a copy of the summons from the clerk and serve it with some member of the family over fifteen years of age.

It is therefore the opinion of this office that the Circuit Clerk shall issue one summons for the petit jurors wherein is included the names of all petit jurors to be summoned.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

FER:MM

MUNICIPALITIES: City's police power and building regulations apply to county property within the city.

FILED
21

January 15, 1936

Hon. Elliott M. Dampf,
Prosecuting Attorney,
Cole County,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "Will you kindly give me your opinion as to the law in the following state of facts?
>
> "Does the city have the power to enforce it's building ordinances against a county for the erection of a county building by funds derived from the bond issue."

Under Section 6092, R. S. Mo. 1929, Jefferson City, Missouri, appears to be a city of the third class.

Sections 6803 to 6817 confer upon cities of the third class various police powers, Section 6803 being as follows:

> "The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof,

> and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Section 6804, in part, provides:

> "The city council may also regulate and control the construction of buildings, the construction and cleaning of fireplaces, chimneys, stoves and stovepipes, ovens, boilers, kettles, forges or any apparatus used in any building, manufactory or business which may be dangerous in causing or promoting fires, and may provide for the inspection of the same. The council may also provide, by ordinance, limits within which no building shall be constructed except of brick or stone or other incombustible materials, with fireproof roofs, and impose a penalty for the violation of such ordinance, and may cause buildings commenced, put up or removed into such limit, in violation of such ordinance, to be removed or abated."

With reference to the rights of counties, Section 12010 provides for the appointment of commissioners to select county seats.

Section 12014 provides that such commissioners shall make suitable selection.

Section 12031 has to do with the power of the county court over such commissioners.

Section 12043 provides that "there shall be erected and maintained in each county, at the established seat of justice thereof, a good and sufficient courthouse and jail."

Section 12045 provides that under certain conditions, cities, acting in conjunction with the counties, may build courthouses for the joint use of both.

Section 12056 provides that "whenever the county court of any county shall think it expedient to erect any of the buildings aforesaid, * * * they shall make an order for the building thereof * * *."

Section 12058 empowers the county court to purchase for the county real estate for a site for a courthouse, etc.

Section 12059 provides for the method of payment for the real estate so acquired.

Section 12060 states that the county court shall designate the place whereon to erect any county building.

Section 12061 provides that if there is no suitable ground for that purpose belonging to said county within the limits of the original town known as the established seat of justice, the superintendent shall select a proper piece of ground anywhere within the corporate limits of the town known as the county seat, and may purchase, etc., and make report to the circuit court.

Section 12065 provides the method of letting the contract for county buildings.

In 43 C. J., page 248, Sec. 247, under "Municipal Corporations", the law is declared as follows:

> "It is held that the county is amenable to the reasonable police regulations imposed by the corporation in the interest of the general welfare."

In the case of Cook County v. Chicago, 311 Ill. 234, 246, 142 N. E. 512, 31 A. L. R. 442, the court in discussing the question of the powers of cities to exercise regulations over county property, said:

> "The powers granted to the counties under the general law do not include the police power. That power is granted to cities and villages under the act concerning their incorporation and by that statute it extends to all buildings within its limits. The county is not required to build a court house within the limits of any city but may build it elsewhere if directed to do so by the people, or may maintain or condemn land of its own volition without a vote of the people. * * * When the county builds a court house within the limits of a city it may be held that in so doing it acts voluntarily. No good reason, therefore, is perceived why it should not be made amenable to the reasonable police regulations imposed

> by the city in the interest of the general welfare. It is urged that the county is an arm of the State to which there has been committed the control of the county buildings, and that it is not, therefore, subject to the police power of the city. While the county is an agency of the State it is likewise a creature of the State vested with only the powers conferred upon it by the State. It is not correct, therefore, to say that the county is a part of the State in the exercise of police power."

In the case of Boone County v. Cantley, 51 S. W. (2d) 56, l. c. 58, in speaking of the right of sovereignty, the court said:

> "By statute (section 3152, R.S. 1929), and at common law, the State is entitled to priority of payment out of the assets of an insolvent debtor. * * * But the statute is without application where the debt is owing by the insolvent debtor to a county or township. * * * And, according to the great weight of authority, the common-law prerogative right of the state is not available to its political subdivisions."

The reasoning in the Illinois case, supra, appears to be logical. While the statutes above cited refer to county courts conferring upon counties certain powers, it does not appear that the police power has been by the Legislature conferred upon counties with respect to county property. On the other hand, the general police power is conferred upon the city, and if the county authorities build within the city, they do so subject to the right of the city to exercise reasonable police regulations over their property.

CONCLUSION

It is our opinion that the City of Jefferson has the right to enforce its reasonable building ordinances against the county with respect to the building of county buildings within the corporate limits of such city.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

INCOME TAX: Salaries of county and city officials are considered in computing income tax.

2-15

February 11, 1936

FILED
21

Hon. Barker Davis,
Prosecuting Attorney,
Canton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter which is as follows:

> "Please advise me if the following are subject to Missouri State Income Tax:
>
> "1. Salaries of County Officers.
>
> "2. Salaries and fees of City Officers, elected or appointed, in municipalities of Missouri."

Section 10115, Laws of Missouri, 1931, page 365, provides for a levy of an income tax of the amounts therein specified, and states:

> "A tax shall be levied upon, assessed against, collected from, and paid by every individual, a citizen or resident of this state, upon net income received from all sources during the preceding year in excess of the exemptions now or hereafter provided."

Sections 10118, 10119, 10120 and 10122, R. S. Mo. 1929, prescribe the exemptions which are allowed under the income tax law of Missouri. The only provision of any of these sections which could have any bearing upon your question is sub-division (5) of Section 10119, which provides:

> "The following income shall be exempt from the provisions of this article: * * * (5) the compensation of public officers for public service where the taxation thereof would be repugnant to the constitution."

Section 6 of Article X of the Constitution of Missouri provides that certain properties therein named shall be exempt from taxation, the pertinent part of which is as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. * * *"

Section 7 of said Article provides as follows:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

In the case of State ex rel. Globe-Democrat Pub. Co. v. Gehner, 316 Mo. 694, with reference to the attitude of the law on exemptions, the court said, l. c. 696:

> "The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation."

In the case of People ex rel. Rice v. Graves, 273 N. Y. S. 582, 242 App. Div. 128, it is held that an income tax is founded upon the protection afforded to the recipient of the income by the State, in his person, in his right to receive the income and in his enjoyment of it when received.

In the case of Ludlow-Saylor Wire Co. v. Wollbrinck, 275 Mo. 339, which was the controlling case in this state upholding the constitutionality of the original income tax law passed in this state, and was decided at the April Term, 1918, of the Supreme Court, it is stated, l. c. 350:

> "The government of this State is a representative republic in which all the power to make laws in the name and with the authority of its con-

> stituent elements--its citizens en masse--is lodged in the temporary Legislature, subject only to the restraining clauses of the constitutions of the State and Nation. Upon this principle is founded the inherent power of that body to legislate at will on any subject and to any extent when, in so doing, neither the State nor the national Constitution is overridden."

And at l. c. 359, quoting from the Supreme Court of the United States, approvingly, the following:

> "'There is no general supervision on the part of the Nation over State taxation; and in respect to the latter, the State has, speaking generally, the freedom of a sovereign both as to objects and methods.'"

And at l. c. 351 the court approvingly quotes the following:

> "'The power to tax rests upon necessity, and is inherent in every sovereignty. The Legislature of every State possesses it, whether particularly specified in the Constitution as a grant of power to be exercised or not. In reference to taxation, the Constitution is not so much to be regarded a grant of power as a restriction or limitation of power.'"

And at l. c. 353, speaking of the constitutional provision that taxes on property should be levied according to value, the court construes that provision not to apply to income taxes, and approvingly quotes from Black on Income Taxation (3 Ed.), p. 41, sec. 36, as follows:

> "'A tax on incomes is not a tax on property, and a tax on property does not embrace incomes. . . . For the same reason a tax laid on incomes is different from a tax laid on the property out of which the income arises,

> and although a statute may tax land at a different rate from that imposed on incomes, it is not therefore in conflict with a constitutional provision that taxation on all species of property must be uniform.'"

And at l. c. 356 the court says:

> " * * * it follows that the excluded classes of property embracing incomes, etc., are not within the regulative provisions of the Constitution (Secs. 6, 7, Art. 10) specifying what 'property' shall be exempt from taxation." (The court makes a like differentiation with respect to Sec. 8 of Art. 10).

In the case of Bacon v. Ranson, 331 Mo. 985, 56 S. W. (2d) 786, the constitutionality of the 1931 income tax law was again challenged, and the court there decided that an income tax is not a tax on property as the term is used in Sections 3, 4, 6, 7 and 9, Article 10 of the Constitution of Missouri, and likewise holds that this statute is not violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The statutes exempting certain properties or income therefrom from the payment of an income tax in this state do not name the salaries of county officers, nor the salaries of officers of municipalities, as coming within the exempted class. On the contrary, Section 10115, Laws of Missouri, 1931, provides that the income tax shall be computed upon net income received from all sources during the preceding year in excess of the exemptions provided.

The 1931 Act became effective in the summer of that year, and there can be no question herein as to changing the salary of an officer during his term of office, if for no other reason, because of the lapse of time since the enactment of this law.

A person's salary, when received by him, does not thereafter belong to the county, or to the state, or to the person who has paid it to him, and there can be no application of the constitutional exemption of Section 6 of Article X of the State Constitution. A county officer or city official, when he is paid his salary, has received an income just the same, within

the meaning of the income tax law, as if he had received this money from a private source, and by the terms of Section 10115 he is required to pay upon his net income, and in figuring what is his net income his salary should be included.

CONCLUSION

It is our opinion that in arriving at the net income of a person resident of Missouri who has received during the preceding taxable year an income in the form of salary from a county or from a city within Missouri, such salary so received should be considered a part of his income taxable under the laws of this state, and he should file a return and pay an income tax to the state unless after having so figured his net income the exemptions as set out in the above referred to Sections 10118, 10119, 10120 and 10122 relieve him of such duties.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

GAMBLING: Suit Clubs.

3-20

March 19, 1936.

FILED
21

Hon. Barker Davis
Prosecuting Attorney
Lewis County
Canton, Missouri

Dear Sir:

We have your request for an opinion which is as follows:

"Enclosed herewith and attached hereto please find plan, termed 'Suit Club Rules'. The number taken in each so-called club is limited to exactly 50 persons by oral agreement between the store and the signers. Each so-called member signs his name on back of sheet similar to the one attached hereto and such signed sheet is held by store. The rest of the plan is fully set out on the attached sheet.

SUIT CLUB RULES

Based on $22.50 Suits and Overcoats.

1. Payments: $2.50 first week and $2.00 week thereafter for ten weeks, terminating in eleven weeks. If member desires a suit at more than $22.50 he may have same by paying the difference.

2. A drawing will be held each Saturday night and the member whose name is drawn will pay no more and will get his $22.50 suit for the amount paid up to that time. PROVIDED HE IS NOT IN ARREARS WITH HIS PAYMENTS, IN WHICH CASE HIS NAME WILL BE PUT BACK AND ANOTHER DRAWN.

3. At the end of eleven weeks those who have not been drawn will have their suits paid for and may make their selections. EVERY MEMBER GETS A SUIT.

4. The name drawn at the first drawing will get his suit for $2.50; the second drawing, $4.50; the third drawing, $6.50, etc. until the tenth. The name drawn at the eleventh drawing will be entitled to a $25.00 suit.

5. Those who drop out after the second payment will be given a credit slip for the amount paid in to be used on a suit at $22.50 or more at any time. This credit will not be good on other merchandise, and the member will not be eligible to participate in the drawings but can be reinstated at any time by making up back payments.

6. Those who wish to get their suits before the last drawing can do so by paying the full price of $22.50. In case one of these names is drawn the member will receive a cash refund for the difference between $22.50 and the amount that would have been due at the time his name was drawn.

7. New members will not be accepted to replace those who have been drawn out. The member whose name is drawn will get his suit whether he is present at the drawing or not."

Section 4314 R. S. Missouri 1929 covers either the establishing or setting up of any lottery or given enterprise. It is now well established in this state, as well as in every other jurisdiction, that the three essential elements of lottery are (1) prize, (2) consideration, and (3) chance. This is the holding of State vs. Emmerson, 188 S.W. (2d) 109.

It appears that State ex rel. vs. Mayer Tailoring Company et al. 25 S. W. (2d) 98, covers a state of facts similar to those presented by you herein. It was held that the maturing of certificates for suits of clothes by an arbitrary method was a violation of the lottery law of this state.

It is therefore the opinion of this office that the "Suit Club Rules" as outlined in your request for an opinion constitute a lottery and are in violation of Section 4314 R. S. Missouri 1929.

Yours very truly,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

FER:MM

PUBLIC SERVICE COMMISSION: May require safety appliances on railroads.

April 22, 1936. 4-28

FILED
21

Hon. Delmar Dail,
Marceline, Missouri.

Dear Senator Dail:

Under date of April 20, 1936, you requested an oral opinion from this Department on the following question:

> "Can the Public Service Commission require safety appliances on railroads?"

Section 5163, R. S. Mo. 1929, sets out the powers and duties in respect to railroads and provides in part as follows:

> "The commission shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations as hereinbefore defined, and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all the provisions of law, orders and decisions of the commission and charter requirements."

In the case of State v. Missouri Southern R. Co., 214 S. W. 381 (Mo.) l. c. 384, the court in holding that the Public Service Commission's order requiring a railroad to operate spur tracks which the railroad sought to abandon was not necessarily invalid because it would result in some financial loss to the railroad, said:

> "In this state, as in that, the act provides a complete system for the regulation and control of public service corporations. State ex inf. v. Gas Co., 254 Mo. loc. cit. 534, 163 S. W. 854. The act adds to the powers expressly given to the commission all others necessary to the full and effectual exercise of those powers. All rates, fares, facilities, service and equipment, and changes therein, fall within the authority of the commission. Adequate service and facilities are expressly required to be furnished. Questions relative to these things are to be determined by the commission."

Section 5165, R. S. Mo. 1929, provides that the commission may investigate the cause of all accidents on any railroad, as follows:

> "The commission shall investigate the cause of all accidents on any railroad or street railroad within this state which result in loss of life or injury to persons or property, and which in its judgment shall require investigation. Every common carrier, railroad corporation and street railroad corporation is hereby required to give immediate notice to the commission of every accident happening upon any line of railroad or street railroad owned, operated, controlled or leased by it, within this state, in such manner as the commission may direct. Such notice shall not be admitted as evidence or used for any purpose against such common carrier, railroad corporation or street railroad corporation giving such notice in any suit or action for damages growing out of any matter mentioned in said notice."

Section 5170, R. S. Mo. 1929, sets out the power of the commission to order repairs or changes in order to promote security of the public or employees, thus:

> "If in the judgment of the commission, additional tracks, switches, terminals or terminal facilities, stations, motive power or any other property, construction, apparatus, equipment, facilities or device for use by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation

> of passengers or property ought reasonably to be provided, or any repairs or improvements to or changes in any thereof in use ought reasonably to be made, or any additions or changes in construction should reasonably be made thereto in order to promote the security or convenience of the public or employes, or in order to secure adequate service or facilities for the transportation of passengers or property, the commission shall, after a hearing, either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it. If any repairs, improvements, changes or additions which the commission has determined to order require joint action by two or more of said corporations, the commission shall, before entry and service of order, notify the said corporations that such repairs, improvements, changes or additions will be required and that the same shall be made at their joint cost, and thereupon the said corporations shall have thirty days or such longer time as the commission may grant within which to agree upon the part or division of cost of such repairs, improvements, changes or additions which each shall bear. If at the expiration of such time such corporations shall fail to file with the commission a statement that an agreement has been made for a division or apportionment of such repairs, improvements, changes or additions, the commission shall have authority, after further hearing, to fix in its order the proportion of such cost or expense to be borne by each corporation and the manner in which the same shall be paid and secured."

Section 5239, R. S. Mo. 1929, grants the Public Service Commission power to require such equipment or performance of acts which the health or safety of the employees of the railroad or the public may demand, thus:

> "The commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every person, corporation and public utility, to maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employes, passengers, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block and other systems of signaling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employes, passengers, customers or the public may demand."

Section 5246, R. S. Mo. 1929, provides that all orders of the commission shall be deemed prima facie lawful and reasonable, as follows:

> "All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter."

Section 5247, R. S. Mo. 1929, provides that in proceedings before the commission growing out of the exercise of the authority and powers granted to the commission, the burden of proof is on the adverse party, as follows:

> "In all trials, action, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement,

direction or order of the commission complained of is unreasonable or unlawful as the case may be."

The case of State v. Public Service Commission, 297 S. W. 47, (Mo.) l. c. 49, the court in holding that in reviewing orders of the commission the test was whether same was unreasonable and unlawful, said:

"It is true that the order of the commission may be reviewed, but it is provided that:

"'The burden of proof shall be upon the party adverse to such commission, or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.' Section 10535, R. S. 1919.

"The test is: Is the order of the commission unreasonable or unlawful? State ex rel. v. Busby (Mo. Sup.) 274 S. W. 1067; State ex rel. v. Public Service Commission, 271 Mo. 155, 196 S. W. 369; Chicago, B. & Q. R. Co. v. Public Service Comm., 266 Mo. 333, 341, 181 S. W. 61; State ex rel. v. Public Service Comm. (Mo. Sup.) 275 S. W. 940, 946.

"The order of the commission requiring the construction of the overhead crossing is in harmony with the declared public policy of the state. There is nothing in the evidence tending to prove that in the circumstances of this case the order is unreasonable or unlawful. Chicago, R. I. & P. R. Co. v. Public Service Comm. (Mo. Sup.) 287 S. W. 617, 619 (2) and cases cited."

Section 5251, R. S. Mo. 1929, provides as follows:

"A substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the rules, orders, acts and regulation of the commission, and they

> shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

The court in the case of State v. Kansas City Gas Co., 163 S. W. 854, l. c. 858, in holding that this law is to be liberally construed, said:

> "That there had been a vast increase in such utilities in the last decade or two, and that evils have grown up crying out lustily for a cure by the lawmaker, is writ larger in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view, and retarding the mischiefs struck at--all pro bono publico. Besides all which the lawmaker himself has prescribed, it 'shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.'"

An examination of the above cases and statutory provisions demonstrates a clear intention upon the part of the Legislature to require the Commission to look after the security of the public in the use of railroads, by examining the latter and keeping themselves informed as to their condition (Section 5163), investigating the causes of all accidents (Section 5165), and ordering any repairs or improvements, including safety devices reasonably necessary (Section 5170).

That the Public Service Commission may, after a hearing, order the installation, use, maintenance and operation of appropriate safety appliances in connection with the operation of railroads is set out in clear and unambiguous language in Section 5239, and it is declared that such orders by the Commission are prima facie lawful and reasonable until found otherwise in a suit brought for that purpose (Section 5246), the burden being upon the adverse party to show by clear and satisfactory evidence that the order is unreasonable and unlawful as the case may be (Section 5247).

In view of the liberal construction to be given the above provisions (Section 5251), plus the fact that specific authority has been granted the Commission to order the installation of safety appliances, we are of the opinion that, after a hearing by the Public Service Commission on its own motion or upon complaint, the Commission may order installation, use, maintenance and operation of appropriate safety devices deemed by it to be reasonably necessary on railroads for the safety of the public and its employees.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

WW:HR

INSURANCE: An insurance company incorporated under Art. IV, Chapter 37, R.S. Mo. 1929 may increase its capital stock as provided in Sec. 5915, R.S. Mo. 1929.

5-14

May 13, 1936.

FILED
21

Honorable Elliott M. Dampf,
Prosecuting Attorney,
Cole County,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of March 20, 1936 wherein you request an opinion as to the following state of facts:

> "In order to determine the tax liability of an insurance company organized on the stipulated premium plan, I desire, and will appreciate, your opinion on the following question:
>
> "May an insurance company which was organized as a stipulated premium company with a capital of twenty-five thousand dollars, under Article IV of Chapter 37 of the Insurance Laws of Missouri, lawfully increase its capital stock, even though there is no express provision in that particular Article authorizing such increase?"

It is true that Article IV, Chapter 37, Revised Statutes Missouri, 1929, relating to insurance on the stipulated premium plan, does not make provision for the increase or reduction of the capital stock of said companies, the article being wholly silent as to this matter. However, Section 5915, R.S. Mo. 1929, which is within Article X of Chapter 37, relating to general provisions governing all insurance companies, provides:

> "Any insurance company incorporated under the laws of this state may increase or reduce its capital stock for the purposes, in the manner and to the extent prescribed by law: Provided, the board of directors of any company desiring so to increase or reduce its stock shall file with the superintendent of the insurance department a certified copy of the proceedings, both of the stock-holders' and directors' meetings, at which it was determined to increase or reduce such stock, and upon being satisfied that the law has been fully complied with, that the proceedings were regular, that the condition and assets of the company justify the increase or reduction, and that the same will not be prejudicial to the interests of the policyholders, the superintendent shall issue a certificate authorizing said increase or reduction, and showing that the stock of said company has been increased or reduced, the amount to which it is increased or reduced, the par value of the shares; and such certificate shall be filed and recorded as in this chapter is provided for filing and recording the certificates of incorporation; and thereafter such company shall, with such increased or reduced capital, be subject to the same liabilities that it possessed or was subject to at the time of the increase or reduction of its capital; and the charter or certificate of incorporation of such company shall be deemed to be amended in respect to the amount of capital and the par value and number of shares, so as to conform to such increase or reduction."

While Article IV, Chapter 37, does not make provision for the increase in the capital stock of these companies, neither does it forbid it, and in view of Section 5915, which is applicable to any insurance company incorporated under the laws of this

state, it is the opinion of this department that an insurance company incorporated under Article IV, Chapter 37, R.S. Mo. 1929 may increase its capital stock as provided in this section.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

PEDDLERS: Whether or not a person is a peddler depends upon the facts in each case. Peddler defined, discussed and applied.

June 3, 1936.

6-9

FILED
21

Hon. Elloitt M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr.Dampf:

This is to acknowledge your letter as follows:

> "Will you kindly give me your opinion if it is necessary for a firm to pay a state peddler's tax under Section 13318, Revised Statutes of Missouri, 1929, under the following conditions:
>
> "The manor Bakery of Kansas City, Missouri, manufacture bread in Kansas City, Missouri and ship same to their local agents in various part of Missouri (including Jefferson City), who take this bread on their routes in carriages and solicit and sell same to the consumer."

Whether or not a person is a peddler within the meaning of Chapter 96, R. S. Mo. 1929, depends upon the facts. In City of Washington v. Reed, et al. 70 S. W. (2d) 121 the St. Louis Court of Appeals defined "hawkers" and"peddlers" as follows: Page 122.

> "While it is true that the occupation of peddler is usually regarded as a lowly occupation, it cannot be seriously contended that there is anything immoral or hurtful in the business of peddling goods, wares and merchandise. Peddlers and hawkers are synonymous terms. The hawker is defined as a peddler who uses a beast of burden to carry his wares around and cries out the merits of his wares in the street, whereas

> the peddler is usually thought of as a man with 'a pack on his back,' going from place to place, exhibiting his wares for sale and immediate delivery."

Section 13312 R. S. Mo. 1929, declares certain persons to be peddlers and reads as follows:

> "Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

Section 13313 R. S. Mo. 1929, provides as follows:

> "No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents or otherwise; and no peddler shall sell wines or spirituous liquors."

Section 13317 R. S. Mo. 1929, provides as follows:

> "Any person may obtain a peddler's license by application to the collector of the county in which he intends to carry on his trade, by paying the amount levied on such license."

Section 13318 R. S. Mo. 1929, provides for license fees to be paid by peddlers.

Your letter states that a bakery of Kansas City, Missouri, ships its product to local agents who sell such to consumers. You desire to know if the bakery must pay a peddler's tax. It is our opinion that the bakery would not have to obtain a state peddler's license because of the provisions of Section 13313, supra, which

section was by the Kansas City Court of Appeals in State v. Downing, 22 Mo. App. 504, l. c. 508, construed as follows:

> "The next objection urged to the judgment of defendant is, that, as the license was issued to Gale, and defendant was his agent, peddling for him, Gale himself not using the license, the statute was not violated. I think the correct interpretation of section 6472, Revised Statutes, is that the license shall be issued to the person actually using it. That is, the individual peddling must have the license. I think the doctrine of principal and agent, invoked by defendant, does not apply to this statute. It says no two persons shall deal under the same license, whether they be 'partners, agents, or otherwise.' It is equivalent to saying, no person shall peddle under the guise of being a partner or agent of one who may have a license. The staute contemplates that the peddler himself will have his license at all times ready for exhibition to any sheriff, collector, constable, or citizen. Sect. 6479, Revised Statutes. It was not intended that his right to peddle should depend on his proof of agency for some one who might be licensed."

Your letter states that the bakery's local agents "take this bread on their routes in carriages and solicit and sell same to the consumer". If such is a fact the local agent would have to be licensed. State v. Smithson, 106 Mo. 149. The Springfield Court of Appeals, in City of Aurora v. Stafford, 51 S. W. (2d) 547, held that a person was not a peddler on the following facts: Page 548.

> "From this agreed statement, it appears that defendant was the agent

> of Crookshank's bakery in the city of Aurora. That said bakery had regular customers in the city of Aurora who were operating retail stores in said city, and who bought from said bakery in Springfield certain of its products at wholesale to be resold by them at retail. That the bakery did not sell to consumers, nor did defendant as its agent go from house to house to sell its products, but the dealings of the bakery through defendant at its agent was confined solely to sales as a wholesaler to its regular customers who were retail merchants doing business within the city limits of the city of Aurora. Do these facts show that defendant was a peddler within the meaning of the statute of the state and the ordinances of the city of Aurora?"

The Court's reasoning for holding that the facts did not show the person a peddler being as follows:

> "The statute, section 13312, Rev. St. 1929, defines a peddler as follows: 'Whoever shall deal in the selling of * * * goods, wares or merchandise * * * by going about from place to place to sell the same, is declared to be a peddler.' As far as this case is concerned, the provision of the ordinance of the city of Aurora, under which defendant is prosecuted, is substantially the same as the statute. It is therefore a valid ordinance. Was defendant a peddler? We do not think so. The term 'peddler' in the statute and ordinance should be given its meaning as it is ordinarily understood. A peddler is generally understood to be a person who carries his wares with him, and goes from house to house or place to place to sell them, and does sell and deliver them to each purchaser as he goes along,

> without any previous agreement relative thereto. A great many cases have arisen in this state in which this statute has been applied to a great variety of facts, but we find no case where the facts were as stipulated in this case. The cases from other states to which our attention has been called are uniform in holding that, under similar facts, the party is not a peddler. Commonwealth v.Standard Oil Co. (Ky.) 93 S. W. 613; Newport v. French Bros., 169 Ky. 174, 183 S. W. 532; Castles Ice Cream Co. v. Perth Amboy, 146 A. 37, 7 N. J. Misc. 415; City of St. Paul v. Briggs, 85 Minn. 290, 88 N. W. 984, 985, 89 Am. St. Rep. 554; State v. Fetterer, 65 Conn. 287, 32 A. 394, 395, 396; In re Watson, 17 S. D. 486, 97 N. W. 463, 466, 2 Ann. Cas. 321.
>
> "Some of these cases go so far as to say that a wholesaler selling to a retailer and not to a consumer is not a peddler. It is not necessary in this case for us to go that far, and we are not prepared to say that under no circumstances at all could a wholesaler who sold only to retailers be held to be a peddler; but when the wholesaler confines his sales to retailers who are his regular customers he is not a peddler, even though the party delivering the goods does not know until he reaches the place of business of the retailer just how much goods the retailer will want."

We invite your attention to the fact that in the City of Aurora case the wholesaler confined his sales "to retailers who are his regular customers." In the case you present the bakery ships its product to its local agent, who in turn sell to consumers, which we assume, are not regular customers. It is our opinion, from the facts stated in your letter, that the agents selling bread of the bakery of Kansas City, to consumers,

would have to be licensed, and if such do not obtain State licenses they would be amenable to the penalty provided for by Section 13319, R. S. Mo. 1929.

Yours very truly

James L. HornBostel
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

JLH:H

PRIMARY ELECTIONS: Persons known to be affiliated with one Party not entitled to vote the ticket of the other Party, unless he obligates himself by oath or affirmation to support the Party nominees of the ticket he is voting, in the following general election.

June 27, 1936

7-14

FILED
27

Dr. J. H. Davidson
Chairman
Saline County Democratic Committee
Gilliam, Missouri

Dear Dr. Davidson:

This will acknowledge receipt of your letter requesting an opinion from this Department, which reads as follows:

"I am writing to ask that you give me an opinion on the legality of keeping republicans from entering the democratic primary. And also advise me as to the methods the county committee must use to keep them out if it can be done so legally. It has been the custom of about 1500 republicans in this county to go into the democratic primary and help to nominate our candidates for state and county officers and then not support them in the general election.

"The county committee has often discussed this matter but have never found a satisfactory way to stop it because of doubts of the rights of democratic judges of election to challenge a voter and ask him what ticket he is going to vote.

"Has an election judge the right to make a voter swear he will vote the ticket in November if he enters the democratic primary. Our committee will meet July 1st and I will appreciate it very much if you can give me this opinion by that time.

"Thanking you in advance, I am."

The answer to your inquiry is found in Section 10271, Revised Statutes Missouri 1929; said section reads as follows:

> "It shall be the duty of the challenger to challenge and the duty of the judges of election to reject the ballot of any person attempting to vote other than the ticket of the party with which he is known to be affiliated,unless such person, when challenged, obligates himself, by oath or affirmation, administered by one of the judges, to support the party nominees of the ticket he is voting in the following general election. All judges of the election shall have authority and are empowered to administer such oath, or affirmation, and any person offering to vote who shall fail or refuse to take or make such oath or affirmation when demanded by such challenger, or required by any judge, shall not be allowed to vote at such primary election."

It is plain from the above section that challengers and judges of election not only have the authority, but it is made their duty, to challenge and reject the ballots of any person attempting to vote at a primary other than the ticket of the party with which such person is known to be affiliated, unless such person, when challenged, obligates himself, by oath or affirmation, administered by one of the judges, to support the party nominees of the ticket he is voting in the following general election. All persons offering to vote who shall fail or refuse to take or make such

oath or affirmation when demanded by the challenger or required by any judge, are not entitled to vote at such primary election.

CONCLUSION

It is, therefore, the opinion of this Department that it is the duty of any judge of a primary election to reject the ballot of any person attempting to vote other than the ticket of the party with which such person is known to be affiliated, unless such person, when challenged, obligates himself, by oath or affirmation, administered by one of the judges, to support the party nominees of the ticket he is voting, in the following general election. If a person so challenged fails or refuses to take or make such oath or affirmation when required by any judge, the judge or judges should refuse to allow him to vote at such primary election.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

COUNTY BUDGET ACT: County Clerk does not incur liability on his official bond for issuing warrants so long as the same do not violate the terms of the Act.

October 19, 1936.

10-19

FILED
21

Honorable Frank H. Davidson,
County Clerk,
Cass County,
Harrisonville, Missouri.

Dear Sir:

This department is in receipt of your letter of October 14, making the following inquiry:

> "Section 10211, R.S. (Session Laws 1933) provide that in all precincts casting less than 300 votes at the last general election, the judges shall appoint two clerks.
>
> "If the County Court makes an order that in order to save paying judges and clerks for two days for serving on an election board, they will pay two additional clerks in case the judges of election appoint them, and I as County Clerk issue warrants on the election fund, and the amount appropriated in the budget is sufficient to pay said additional clerks, in precincts casting less than 300 votes; will I be liable on my official bond under Section 8 on page 346 of the 1933 Session acts?"

The County Budget Act (Laws of Mo. 1933, pp. 340-346, relates to the county financial system in counties of less than 50,000 population. Section 1 of the Act refers to the duties of the county court in preparing a budget, the terms of which you are no doubt familiar with. Section 2 relates to the classification of expenditures and Section 1 makes it the duty of the county court to sacredly preserve the priority of payment of the five classes therein enumerated. The other

sections relate to the duties of the various officers with respect to revising and finally preparing the estimate for the budget for the fiscal year. The penal section, Section 8, (p. 346) provides in part as follows:

> " * * * * Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

We think the penal section refers exclusively to the terms of the Budget Act, i.e., that the warrants must be executed and paid out in conformity with the terms and provisions of the Act. In the instance which you present, it appears that funds have been set aside under Class 2 for the cost of elections and that there are at the present time ample funds in said class to pay election warrants.

We are of the opinion that it does not devolve upon you as County Clerk to determine the validity of the warrants in question unless said warrants present a defect apparent on its face. Under Sec. 12161, R.S. Mo. 1929, it is your duty to issue warrants on the Treasurer for moneys ordered to be paid by the County Court, and we are of the opinion that the penal section of the County Budget Act refers exclusively to your duties under said Act. When a warrant is issued by you which does not violate the terms of the Budget Act, there is no liability on your official bond.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CONVICTS: Convicts while serving life sentence and dying while so incarcerated, leaving a personal estate within the county of their death, such personal estate shall be administered by the probate court of the county wherein the convict died.

October 27, 1936

10-27

FILED
21

Mr. Elliott M. Dampf
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Dampf:

This will acknowledge receipt of your request for an opinion on the following set of facts:

> "On April 1, 1936, Edwin M. Bode, Public Administrator of Cole County, Missouri, was appointed by the Probate Court of this County to take charge of the above estate and administer thereon according to law. A few days later the Probate Court of Jefferson County mailed a certified copy of letters of administration, appointing one Fred Oetjen, persumably a brother of the deceased convict, this certified copy of the letters bearing the date of the 3rd day of April, 1936, two days after the date of Mr. Bode's appointment.
>
> "Mr. Bode went in person to the Prison Board, more especially to the Secretary and Treasurer and demanded the money, which amounts to something like $286.15, but they refused to pay him the money and stated that Jefferson County was claiming the domicile of the deceased convict, Herman Oetjen, but the Jefferson County authorities, namely the Prosecuting Attorney, claims that Cole County's appointment should be withdrawn and that the money should be distributed to the creditors or qualified representative of that county.

> "The deceased convict was convicted and sentenced to life imprisonment. Of course, as you know we have a section of the Statutes that provides that the estate of a convict sentenced to life imprisonment may be administered upon as though he had died a natural death."

A search does not reveal wherein the courts of this state have passed upon the proposition, as outlined in the above set of facts and, accordingly, we look to the general proposition of law as laid down respecting the administration of estates of deceased persons, generally. In this respect, we direct your attention to 23 C. J. Page 1010, Section 34, wherein it is stated:

> "The general rule is that the place of a decedent's last domicile determines the probate jurisdiction to grant letters and supervise the settlement of his estate, and the sole, or at least the principal, grant of letters ought to be taken out and the will proved in the country, the state, and indeed the very county where decedent was domiciled at the time of his death. * * *"

Then, again, at Page 1012, Section 36, it is stated:

> "In some jurisdictions, where the deceased had no fixed residence within the state, jurisdiction over the administration of his estate is conferred upon the probate co rt of the county where he died, but such jurisdiction is usually given in the alternative, to such court or to the court of the county wherein the decedent's property or the greater part thereof is situated."

Section 37, on same page, reads:

> "Locality of personal assets belonging to the estate of a decedent confers a local probate jurisdiction, regardless of the consideration of last domicile or residence, * * * *"

Under the provisions of Section 4, of R. S. Missouri, 1929, it reads in part as follows:

> "* * * *. If the deceased had no mansion house or place of abode, and was not possessed of lands, letters may be granted in the county in which he died, or where the greater part of his estate may be. * * *"

Under the provisions of Section 12972 of R. S. Missouri, 1929, it reads as follows:

> "Whenever any person shall be imprisoned in the penitentiary under a sentence of imprisonment for life, his estate, property and effects, shall be administered and disposed of, in all respects, as if he were naturally dead."

It is to be noticed, from the general principle above set forth, the jurisdiction is usually given to the court of the county wherein the decedent's property, or the greater part thereof, is situated and we necessarily assume that in view of the fact the deceased convict, above mentioned in the state of facts, died in Cole County and had $286.15 upon his decease, that this was the greater part, if not all, of such convict's property.

The administration upon the estate of this convict, at the time of his sentence, could have been had under the provisions of Section 12972, supra, in the county from whence this party was sentenced to imprisonment for life. And, we again assume that had this convict any estate at the time of his sentence, his estate would have been administered in accordance with the section heretofore mentioned.

CONCLUSION

We do not intend, by our conclusion reached, to fix any hard and fast rule that would apply in every case where a convict died possessed of real or personal property. But, upon the above mentioned set of facts, we conclude that since the convict above mentioned had been sentenced to life imprisonment in the penitentiary, and subsequently died while incarcerated, leaving a personal estate, that letters of administration should have been taken out in the county wherein such convict died. And, in this particular instance, the

the County of Cole would have been the proper county for the administration of the remaining estate.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:RT

TAXATION: Collection of delinquent real estate taxes in cities of the third and fourth classes.

January 2, 1936.

FILED
22

Honorable Thomas S. Denny
City Attorney
Salisbury, Missouri

Dear Mr. Denny:

Your recent request for an opinion of this office has been received and we are glad to render you an opinion on the following matter:

> "If you have on file a ruling upon the question of whether or not proceedings can be instituted to enforce payment of taxes after five years have elapsed, I would greatly appreciate a copy of such ruling also.
>
> And I am greatly concerned with another question along this line. Suppose the county has not yet listed the real estate for sale, as for instance, in the case where the county taxes are paid, and the city taxes are not. Under such circumstances, does the rule that the city cannot proceed to enforce payment independently of the county apply?"

I.

PROCEEDINGS FOR THE COLLECTION OF DELINQUENT TAXES MAY NOT BE INSTITUTED AFTER FIVE YEARS FROM DATE OF DELINQUENTY.

The Legislature in 1935 repealed Section 9961, page 154, Laws of Missouri Extra Session 1933-34, which Section reads as follows:

> "No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, provided that proceedings for the sale of lands and lots on which taxes are delinquent for the year 1928 may be commenced at any time prior to December 31, 1934. Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained,"

and enacted in lieu thereof a new Section 9961, page 405, Laws of Missouri 1935. This new section eliminated the phrase in the old section authorizing the institution of proceedings for the collection of delinquent 1928 taxes at any time before December 31, 1934, and left this Section a straight five year statute of limitations.

CONCLUSION.

It is therefore the opinion of this office that the initial proceedings for the collection of delinquent taxes must be instituted within five years of the date of delinquency of the tax, the payment of which is sought to be enforced.

II.

CITY COLLECTOR CANNOT INSTITUTE SUIT FOR DELINQUENT CITY REAL ESTATE TAXES.

This office on the 8th day of August 1933, issued an opinion to the State Tax Commission relative to the collection of delinquent real estate taxes due cities of the third and fourth classes and in this opinion it is held that the provisions of Section 6781, pertaining to cities of the third class and Section 6996, pertaining to cities of the fourth class, R. S. Missouri 1929, adopted the procedure set forth in the Jones-Munger Act, page 425 Laws of Missouri 1933, and that after the enactment of such Jones-Monger Act the city collectors of such cities should proceed to enforce the collection of all city real estate taxes in the same manner that the county collectors proceed to collect delinquent real estate state and county taxes.

We herewith enclose to you a portion of that opinion which deals with the collection of all city taxes and includes cities of the third and fourth classes. From this opinion you will see that it is immaterial whether or not the County Collector is proceeding to enforce the collection of delinquent state and county taxes as the collection of such taxes is separate and apart from the collection of delinquent city taxes although the same general procedure is followed in both cases.

The Supreme Court of Missouri has heretofore held that after the effective date of the Jones-Munger Law the County Collector was without authority to institute suit for the collection of delinquent real estate taxes due for state and county purposes. State ex rel. Karbe vs. Bader, 78 S. W. (2d) 835. That decision is equally applicable to the collection of delinquent real estate taxes due cities of the third and fourth classes.

CONCLUSION.

It is therefore the opinion of this office that city collectors of cities of the third and fourth classes are unauthorized to institute suit for the collection of delinquent city real estate taxes but should proceed to enforce the same at the same time and in the same manner as the county collector proceeds to enforce the collection of delinquent state and county taxes on real estate.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM Enc

SHERIFFS: Sheriffs may purchase supplies for County Jail without obtaining a requisition from the County Court, but it is necessary each order be certified by the Accounting Officer.

September 9, 1936.

9-10

FILED
22

Mr. Phil. G.Deuser, Sheriff
Saint Louis County
Clayton, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an official opinion under date of August 31, 1936, which reads as follows:

> "I desire to ascertain whether I may purchase my own office supplies and supplies and materials for the County Jail and legally have such purchases allowed by the County Court, or whether I must make requisition for such supplies and materials to the County Court through the regular channels set up by virtue of sections 9 to 21, both inclusive of the Budget Law.
>
> "Your opinion on this matter will be sincerely appreciated."

We are enclosing a copy of an opinion rendered by this office to Mr. A. R. Gibson, Sheriff, Putnam County, under date of February 17, 1936, holding that "the Sheriff has the authority to purchase the necessarry supplies for the County Jail and he needs no authorization or order from the County Court so to do."

Supplementing this opinion, we refer you to the following section of the Budget Law. Section 19, Laws of Missouri, 1933, p. 350, provides in part:

> "* * * *Contracts which provide that the person contracting with the county shall during the terms of the contract, furnish to the county at the price therein specified the supplies,

> materials, equipment, or services other than personal therein described, in such quantities as may be required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer as herein provided; but all orders for such supplies, materials, equipment, or services other than personal shall bear such certification. * * * *."

Section 20, Laws of Missouri, 1933, p. 351, provides in part:

> "* * * *Any officer purchasing any supplies, materials or equipment shall be liable personally and on his bond for the amount of any obligation he may incur against the county without first securing the proper certificate from the accounting officer. * * * *."

Section 21, Laws of Missouri, 1933, p. 351, provides in part:

> "* * * *Wherever the term 'accounting officer' shall appear, it shall be deemed to mean the county clerk, auditor, accountant, or other officer or employe keeping the principal financial records of the county."

Section 11, Laws of Missouri, 1933, p. 347, provides in part:

> "On or before October 1 of each year, each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county shall prepare and submit to the budget officer estimates of its

> requirements for expenditures and its estimated revenues for the next budget year compared with the corresponding figures for the last completed fiscal year and estimated figures for the current fiscal year.* * * * *."

Therefore, from the foregoing, it is the opinion of this department that such purchases made by you, as sheriff, should come within your estimate filed with the County Court as provided in Section 11, of the Budget Act. Furthermore, it is not necessary that you obtain a requisition from the County Court for the purchase of supplies. But it is necessary to have each order certified by the Accounting Officer as contained in Section 20 quoted supra.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

ARH:H

MORTGAGES: Method of releasing chattel mortgage.

January 24, 1936. Y30

FILED
24

Hon. Gerald J. Donworth,
Recorder of Deeds,
St. Louis County,
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of January 18 inquiring as to the proper cancellation when chattel mortgages are released. Your letter is as follows:

> "It has always been my contention that the notes described in a filed chattel mortgage should be presented for cancellation when the mortgage is released. I have recently been requested to make releases upon presentation of a statement by the mortgagee, sworn to before a Notary Public or Justice of the Peace and without the presentation of the note. This form of release is in compliance with the 3rd article of Section 3099 of the 1935 Session Acts.
>
> "This section does not mention the notes and as it has always been customary to present same, I have hesitated to grant the request. Any subsequent purchaser of a note secured by a filed chattel mortgage would have no protection, it seems, from a fraudulent release if this sort of release would be legal.
>
> "Kindly advise at your earliest convenience if the acceptance of a release of this nature would cause any liability on the part of the Recorder of Deeds."

In 1935 the Legislature repealed Section 3099, R.S. Mo. 1929 and enacted in lieu thereof a new section of the same number, said section being as follows: (Laws of Mo. 1935, p. 209)

> "Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall receive a fee of twenty cents. Said fee shall also include and cover all costs for discharging said mortgage or deed of trust according to the methods hereinafter provided. Such mortgage or deed of trust, when satisfied, shall be discharged by any of the following methods:
>
> "1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder.
>
> "2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him is the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied.
>
> "3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.
>
> "When any of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied', giving date. When a chattel mortgage shall be satisfied as above provided, the recorder may deliver said mortgage to the holder of the note secured thereby, or if the holder of said note refuse to receive the same the recorder may destroy said

> mortgage: Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register."

Thus it will be noted that a chattel mortgage may be satisfied (1) by the mortgagee satisfying same on the margin of the index; (2) by the mortgagor presenting the chattel mortgage and making affidavit that the chattel mortgage presented by him is the original of the copy on file; (3) upon presentation of a sworn statement by the mortgagee that the mortgage has been paid.

In the case of Rogers v. Davis, 194 Mo. App. 378, the Court held that it was not necessary to release a lien by the methods as found in the statute, but that a mortgagee could waive his rights by his own actions. The Court said (l.c. 388):

> "As to the merits, appellant contends that the oral consent of Hawkins to the trade made by Brown did not operate to release the mare from the lien of Hawkins' mortgage. It is conceded that the ruling in Coffman v. Waltom, 50 Mo. App. 404, is contrary to this contention, but it is pointed out that section 2863, Revised Statutes 1909, was subsequently enacted, and it is argued that property may now be released from the lien of a chattel mortgage only in one of the ways prescribed by this action. But we regard this argument as unsound. The statute merely makes provisions for releasing of record chattel mortgages that have been satisfied. A mortgagee may fully waive his rights under a chattel mortgage though the same remain unreleased of record. This Hawkins did in the instant case by consenting to the exchange of the mare for the negro's horse. (See Coffman v. Waltom, supra; Love v. Scott, 179 Mo. App. 351, 166 S.W. 856; 7 Cyc. 74; Jones on Chattel Mortgages (5 Ed.), sec. 456, and authorities cited.

And in the case of Brown v. Koffler, 133 Mo. App. 494, it was held that the releasing of a chattel mortgage is bona fide evidence of payment, subject to be overcome by oral evidence. The Court said (l.c. 500-502):

> "The principal contention of defendants is that the court erred in admitting the chattel mortgage in evidence over their objection, and in refusing to give a peremptory instruction to the jury to return a verdict in their favor. The ground of this contention is that since the release of the mortgage by the recorder of deeds should be regarded as a 'quasi-judicial act' of a public officer, the mortgage could not be foreclosed in an action at law until after the release had been set aside in a proceeding in equity. That the action is one at law for the foreclosure of the mortgage is a proposition conceded by plaintiff and abundantly supported by the adjudicated cases. (Carr v. Holbrook, 1 Mo. 240; Thayer v. Campbell, 9 Mo. 280; Riley's Admr. v. McCord's Admr., 24 Mo. 265; Fithian v. Monks, 43 Mo. 502; State ex rel. v. Evans, 176 Mo. 310; Rubey v. Coal Mining Co., 21 Mo. App. 159) The petition does not seek a cancellation of the release nor was the obtaining of such release necessary to the prosecution of the suit. Aside from giving notice and in contests between mortgagor and mortgagee, the statutory entry of satisfaction of a mortgage or deed of trust has no greater force or effect than a receipt acknowledging payment of the debt. It is prima facie evidence of payment but, like a receipt, is open to explanation and its effect may be overcome by oral evidence showing that, in fact, no payment was made. A direct procedding to impeach such entry is not required. (Valle's Admr. v. American Iron Mountain Co., 27 Mo. 455; Seiberling v. Tipton, 113Mo. 373; Joerdens v. Schrimpf, 77 Mo. 383; Lanier v. McIntosh, 117 Mo. 508; Sells v. Tootle, 160 Mo. 606; Luther v. Clay, 28 S.E. 46) In attacking by parol evidence the verity of the release, plaintiff did not enlarge the scope of the cause of action pleaded. She was

entitled to meet the prima facie evidence of payment offered by the release by evidence to the effect that no such payment was made to her nor to one authorized to receive it as her agent and that the release was entered by her mother without authority."

CONCLUSION

It is the opinion of this department that when a chattel mortgage is satisfied by one of the above mentioned statutory methods, you as Recorder of Deeds have fully complied with the law and would incur no liability in the event there was fraud in connection with the release of the mortgage.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

COUNTY WARRANTS: County Treasurer is not liable if warrant is regularly issued and regular on its face - is liable if same violates County Budget Act.

January 13, 1936.

1-20

FILED
25

Honorable Maurice Dwyer,
Treasurer of St. Louis County,
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of some time ago requesting an opinion based on the following facts:

> "Enclosed is a copy of a letter received from and signed by Mr. C.R. Kammerer, which is more or less self-explanatory.
>
> "The warrant mentioned in the letter, i.e., No. 5130 - Road and Bridge Fund, will be due and payable December 16, 1935. For this reason I would like to have your opinion before that time as to just what weight or bearing this letter might have on the payment of the warrant, and my responsibility therein.
>
> "It has always been my opinion that it is not incumbent upon the County Treasurer to inquire into the propiety of the issuance of warrants by the County Court and that it is compulsory for the Treasurer to honor any warrant when drawn properly by the County Court during session and signed by its presiding officer, etc., and that the responsibility rests solely and directly upon the County Court. Am I correct in this?
>
> "The facts related in 'Reason 3' are correct. Other than that I am in no position to say."

We have read the attached letter from Mr. C.R. Kammerer in which he in substance protests your honoring warrant #5130 in the sum of $2,638.80. We shall first discuss the general liability which you might incur by payment of the warrant in question.

The general section relating to the power of the county court to audit and settle accounts is Section 12162, R.S. Mo. 1929, which is as follows:

> "The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and if any person, being served with such summons, shall not appear according to the command thereof, the said court may compel his appearance by attachment; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue a summons, directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which summons shall be served by the sheriff; and if the person named in such summons refuse to appear with or transmit the accounts, books, documents or papers, or show good cause why he does not, at the time appointed for his appearance, the said court may enforce the delivery thereof by attachment; and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts, and may commit to jail any person who shall refuse to answer any

lawful question: Provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

The form of the warrant is set forth in Section 12163, R.S. Mo. 1929, which provides:

"When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus:

A B v. ____ county. The account of A B for the sum of ____ dollars being presented and inquired into, it is found by the court that the sum of ____ dollars is due him from the county, payable out of (express the particular fund, as the case may require), and for which the clerk is ordered to issue a warrant.

"When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor in the following form:

Treasurer of the county of _____, pay to _____ dollars out of any money in the treasury appropriated for (express the particular fund, as the case may require). Given at the courthouse, this ___ day of _____, 19__. By order of the county court.

A B, President,

Attest:
C D, clerk."

Your duty in disbursing funds on warrants is found in Section 12136, R.S. Mo. 1929, which provides in part as follows:

> " * * * He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

The Supreme Court of Missouri in 1931 rendered an opinion on a case which arose in Jackson County in which a warrant was wrongfully drawn, and the county court attempted to rescind the payment thereof. The lower court held that the county court had no power to cancel the warrant - the case was reversed and remanded by the Supreme Court. The opinion, which is very exhaustive as to the powers of the county court and the county treasurer, is in part as follows (l.c. 432-433):

> "By our Constitution county courts are created and are given jurisdiction to transact all county business (Art. 6, Sec. 36) By statute, Section 2078, Revised Statutes 1929, such courts are given power 'to audit and settle all demands against the county.' And Section 12162, Revised Statutes 1929, provides that 'the county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts.' The county court, when it ascertains any sum of money to be due from the county, shall order the clerk to issue a warrant in a prescribed form (Sec. 12163, R.S. 1929) And the county treasurer 'shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court.' (Sec. 12136, R.S. 1929).
>
> "The question here presented as to the binding effect of a county warrant regularly issued by the county court received full consideration by this court in Sears v. Stone County, 105 Mo. 236, in which it appears that Stone

> County had employed one Heffernan, a lawyer, to perform legal services for the county. In due time Heffer-man presented to such county court his claim for legal services rendered amounting to $450 and the county court by proper order allowed the claim for that amount and ordered a warrant issued. Just how or why the warrant so issued was not paid is not shown, but the holder was driven to a suit against the county on the warrant. The county defended on the ground that the warrant was issued without consid-eration. No charge of actual fraud committed in procuring the warrant was made. The plaintiff claimed that the order of the county court in allowing the claim and ordering the warrant issued constituted an adjudication or at least was binding as to the amount and validity of the claim and the war-rant issued therefor, and that this matter could not be again questioned. The court stated the issue raised thus: 'The proper determination of this case depends upon whether county courts, in auditing claims, and ordering warrants against the counties, act in a judicial capacity thus giving to their orders the verity and conclusiveness of judg-ments, or whether they act merely in the character of financial or adminis-trative agents of the counties by which their acts entered of record have simply the force and effect of contracts which are subject to impeachment for want of consideration."

And further, the Court said (l.c. 437-438):

> "In the State of Oregon where the func-tions and duties of the county court and treasurer are similar to those of Missouri, the county court ordered the treasurer not to pay a warrant which had been issued, giving no notice whatever to the holder of the warrant. The holder of the warrant then brought an action in mandamus to compel the payment of the warrant. The treasurer set up the order of the county court as a defense. The court sustained him and refused to issue the writ, saying (Frankl v. Bailey, 50 Pac.

187, l.c. 188):

'The county court is charged, under the statute, with "the general care and management of county property, funds, and business where the law does not otherwise expressly provide." (Hill's Ann. Laws Or., Subsec. 9, Sec. 896) By Section 2460, Id., it is provided that "the county treasurer shall receive all moneys due and accruing to his county, and disburse the same on the proper orders issued and attested by the county clerk." The warrant in question was directed to be issued by the county court, and the legitimate basis for such warrant was the order of the court settling and allowing plaintiff's demand against the county. As we have seen, the alternative writ shows that the court was acting merely as the fiscal agent of the county in making the settlement and entering the said order. Such being the case, the order cannot be said to rise to the dignity of an adjudication as between the claimant and the county. While the orders of the court acting in such a capacity may have the force and effect of accounts stated as against the county, ...the court could, if it saw fit, as an individual might, refuse to observe the obligations thereby imposed, in which case the only remedy left would be an action against the county to require their due observance. It has been held in a late case that warrants such as here exhibited are but evidence of indebtedness, and constitute no final adjudication, as against the municipality, of the claims which they represent. They afford prima-facie evidence that the municipality is legally indebted to the holder thereof, but do not conclude it on that point, and that, in effect, they are nothing more than non-negotiable promissory notes, open to all defenses in the hands of the holders available as between the original parties, but that they may be made the basis of an action against the county. See Goldsmith v. Baker City (Ore.), 49 Pac. 973. Now the county court, having charge of the county funds has directed

> the county treasurer not to pay this alleged obligation of the county, which is an indirect way of disavowing the court's liability; and, as the warrant is not based upon an order having the binding effect of a judgment against the county, we can see no reason why the treasurer is not precluded by the prohibitory order from using the county funds in discharge of the warrant. It is the duty of the treasurer to disburse the funds upon "the proper orders, issued and attested by the county clerk." But here is a warrant which the court has determined--and we must presume for some legitimate reason--should not be paid, and therefore not proper to be honored by the treasurer.'"

The duty of the County Treasurer to pay warrants in proper form is discussed in the same case (County of Jackson v. Fayman) l.c. 438-439):

> Defendants have cited a number of cases, most if not all of them being suits in mandamus to compel ministerial officers to pay county warrants, in which it is claimed that this court has held that the issuance of such warrant by the county court involves a judicial finding of its validity binding on the county court and which cannot again be opened up or inquired into. Mandamus is a short cut in legal procedure where the ordinary procedure is less adequate and therefore held inadequate, but in such procedure questions of fact going to the merits may be inquired into as well as questions of law. The case most relied on by defendant is State ex rel. v. Treasurer of Callaway County, 43 Mo. 228. In that case the county court had allowed a claim and issued a warrant. Later the county court made a further order reducing the amount of the claim and ordering only the reduced amount to be paid. The amount deducted was a definite amount for a distinct item of service which the county court decided was not lawfully payable. Mandamus was brought to compel payment of the warrant as originally issued. What this court did do was to examine into the lawfulness of the payment of the rejected item, and,

> finding it lawful and justly due, ordered the whole warrant to be paid. The decision itself and most of the opinion is in accord with the later rulings of this court. This case is not among the cases reviewed in Sears v. Stone County, 105 Mo. 236, supra, but what is there said of Bank v. Franklin County, 65 Mo. 112, and State ex rel. v. Macon County Court, 68 Mo. 49 applies to State ex rel. v. Treasurer of Callaway County, to-wit: 'So it is evident that when the court says, in the Franklin County case, that the order for the issuance of a warrant is a judicial ascertainment of the amount owing by the county, it is not meant that the order of the county court has the effect and conclusiveness of a judgment.' The further remark of this court in the Callaway County case, 'But where the allowance by the court has been regularly had upon a claim they are required to pass upon, and the warrant has been drawn and presented, and the court adjourned for the term, the treasurer has but one duty; and no subsequent court, not of superior jurisdiction, can excuse him from the performance of that duty,' has not been followed in later rulings of this court but has been virtually overruled. The court, however, further ruled correctly in saying: 'But in entertaining the application (for mandamus) we will look into the claim allowed by the court. It does not follow that, because it is the duty of the treasurer to pay, we will necessarily, in this form of action, order him to do so. If it should appear that the county court has, by mistake or otherwise, audited an illegal claim--one which should have been rejected--we will leave the parties to such remedies as they may have by ordinary proceedings.'"

In the County of Jackson v. Fayman case, supra, the Court holds that it is not your duty to investigate and determine for yourself the legality or validity of warrants, and in our opinion, that is the law, as was said in the opinion (l.c. 441-442):

> "Much is also said as to the heavy penalties imposed on county treasurers as ministerial officers in refusing to

pay county warrants regularly issued by the county and presented for payment. It is true that such ministerial officers are not and should not be required to investigate and determine for themselves the legality or validity of such warrants and should ordinarily pay same without question. Here, however, the constituted authority which had caused this warrant to be issued, and whose order gave it birth and vitality, had taken on itself the responsibility of annulling its action and stamping out its life. The whole trouble here arises from the fact that this ministerial officer undertook to decide for himself that the action of the county court in issuing this warrant was a judicial act and a finality and that such court did not have the judicial power to set aside or modify its judgment after the term. That ministerial officers are not generally visited with penalties or held personally responsible when acting in good faith is held in State ex rel. v. Diemer, 255 Mo. 336. That they must at times assume some risk in the performance of judicial duties is unavoidable, and we commend defendant's action in taking a bond for his own protection on paying this warrant.

"It is urged that on our finding that the defendant county treasurer wrongfully paid the warrant in question out of the county funds, we should enter judgment for the recovery of the amount so paid out with interest. This, however, is not the theory on which plaintiff tried the case. It not only alleges defendant's wrongful payment of the warrant after its annullment, but that at the time of its issuance the county court was not indebted to Ross and that this warrant does not evidence a valid indebtedness due him; that his claim for road work done and material furnished was false and excessive, and that plaintiff was wrongfully induced to issue this warrant for more than or when nothing was actually due contractor Ross. We are holding

> that defendant's payment of the warrant after the county court's order annulling same was at his peril and that plaintiff was entitled to a trial of the issue of whether Jackson County was in fact indebted to Ross and if so, how much, for work done and material furnished under his road contract."

CONCLUSION

In view of the last above quoted portion of the opinion in the case of County of Jackson v. Fayman, we are of the opinion that in accepting the warrant for payment you incur no personal liability providing the warrant is legal on its face and properly drawn by the County Court. We are, however, impressed with the last paragraph of your letter, which states: "The facts related in 'Reason 3' are correct. Other than that I am in no position to say."

Referring to "Reason 3" in Mr. Kammerer's letter, which is as follows:

> "That the records of the St. Louis County Court show that on July 19th, an order was issued requiring the highway engineer to make up a voucher in the sum of $2,638.80 in payment of this claim for a warrant drawn against the road tax fund; that contrary to and in violation of this, the warrant which you have protested was drawn against the road and bridge fund; that under the law no monies can be taken out of the road and bridge fund for anything except actual labor and materials on county roads",

it is our opinion that it is your duty to call this defect to the attention of the County Court so that the County Court may rescind its action, change the warrant, or issue it in legal form and on the proper fund.

We call your attention again to the provisions of the County Budget Act and especially those provisions which relate to counties of the population of St. Louis County. Section 12 of said Act (Laws of Mo. 1933, p. 348) provides for the contents of the budget and Section 20 (p.351) contains the liability of the officers for drawing warrants when there is not a sufficient amount unencumbered in the appropriation, or a sufficient

unencumbered cash balance in the fund to pay the same or for any amount not legally owing by the county. Therefore, if Mr. Kammerer is correct in his statements as contained in "Reason 3", we suggest that it is possible you might incur personal liability if the warrant is drawn against the Road & Bridge Fund when as a matter of fact it should have been drawn against some other fund.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

HIGHWAYS--SPECIAL ROAD DISTRICTS: Commissioners of Special Road Districts, under Article IX, Chapter 42, have exclusive jurisdiction to build roads within the district.

February 10, 1936.

2-15

FILED
25

Mr. George E.Draper
County Highway Engineer
Newton County
Neosho, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 24, 1936, which reads as follows:

> "I am writing you for an expression of opinion relative to Special Road Districts. It looks like our statutes are not very clear on some of the provisions and would like to hear from you as soon as possible in regard to the following:-
>
> "In Sec. 7874 page 2218 R. S. 1929 it appears that the Road Overseer is to keep the roads in his district in good repair as far as his funds permit - then it specifically states that he shall at all times conform to the plans, specifications and instructions of the County Highway Engineer.
>
> "In Sec. 8033 page 2259 R. S. 1929 it seems to confer upon Special Road Districts a power limited to that of a road overseer - then in Sec. 8038 it again limits that power to that of a road overseer under the general road law - then again in Sec. 8052 it states that the general road law shall remain in full force and effect except wherein they conflict with other provisions.
>
> "It does not seem to the writer that it was intended to place the tax money in the hands of a few commis-

sioners who would probably know nothing whatever about building a highway without placing some restraint on it to provide for efficiency.

"When a fellow goes out on a road and sees the taxpayers money being frittered away by employing men who would not know a needle beam from a gusset plate it naturally makes me wonder just what our road law means.

"Can the County Engineer make a special Road District conform to grade established by him so that a road will drain.

"Can he require them to submit plans and specifications to him before starting a road improvement and with the approval of the County Court--can that plan be changed to make it workable.

"Under the law the Special Road Districts are not required to build any bridge that costs over $50.00 - with all the road money turned over to the Special - from what fund shall the County draw to pay the expense.

"Is the road district (Special) according to the foregoing citations, granted any other power, aside from the few not granted to a Road overseer, greater than a road overseer? If they are not granted any greater power than a road overseer in the matter of repair building and maintenance, do they come under the County Highway Engineer for instructions the same as a road overseer?"

From your letter it would seem that Newton County has a Special Road District organized under the provisions of Article IX, Chapter 42, R. S. Mo. 1929. You ask if such a Special Road District can build roads

without consulting the County Highway Engineer and complying with his specifications and restraints.

The County Highway Engineer is an employee of the County Court and is recognized as a county officer. See Section 8006, R. S. Mo. 1929.

Special Road Districts, organized under Article IX, Chapter 42, R. S. Mo. 1929, are political subdivisions of the State and have authority to build roads independent of similar authority vested in county officers. After providing for commissioners, as administrative officers of Special Road Districts, the Legislature gave them power as provided in Section 8033, R. S. Mo. 1929, which reads:

> "Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at it command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

In the case of Harris v. Bond Company, 149 S. W. 603; 244 Mo. 664, l. c. 686, our Supreme Court held that Special Road Districts organized under Article IX, Chapter 42, R. S. Mo. 1929, are political cooperations, and as such have authority to issue bonds. The Court said in rendering its decision:

"After the incorporation of a special road district, the statute provides for the appointment of a board of commissioners. The general power and authority of this board, as to the construction, maintenance and repairs of roads and highways, as declared by sec. 10585, Revised Statutes 1909, is 'sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein,' etc. Clearly, this statute transfers from the county authorities all authority and control which they previously possessed and exercised pursuant to the Constitution and laws of the State over roads and bridges within such district, and confers the same upon this board of commissioners, and as incidental thereto, all taxes and revenues, from whatever sources derived, which were formerly levied and collected for roads and bridge purposes of such district, are also removed from the care, control and disbursement of the county officials and are by this statute entrusted with other taxes, to the care and expenditure of this board of commissioners."

CONCLUSION.

We are of the opinion that Special Road Districts in Missouri which orginate under Article IX, Chapter 42, R. S. Mo. 1929, are legal entities, and as such are not subject to the supervising control of the County Highway Engineer. Roads and bridges in the Special Road District are built and maintained by special tax within the district and commissioners of the district have a right to spend the district's money within its jurisdiction, and the County Highway Engineer has no authority over roads and bridges of the Special Road District by reason of his statutory authority over county road overseers.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

ROY McKITTRICK
Attorney General.

WOS:H

CORPORATIONS: Approval of Articles of Agreement of Medical Guild Service, Inc.

1212

December 12, 1936.

FILED
25

Mr. Carlyle J. Dunn,
Attorney at Law,
4 N. Eighth Street,
St. Louis, Missouri.

Re: Medical Guild Service, Inc.

Dear Mr. Dunn:

This is to acknowledge your letter dated December 11, 1936, wherein you enclose a copy of proposed Articles of Agreement of "Medical Guild Service, Inc.," and you desire our opinion of approval of said Articles.

If the court enters a pro forma decree of incorporation along the same plan stated in the Articles of Agreement of Medical Guild Service, Inc., as attached to your letter and retained in our files, in our opinion, it would be a legal incorporation under Article 10, Chapter 32, R. S. Mo. 1929.

It is our further opinion that said proposed plan, if incorporated by a pro forma decree, would not be a cooperative company within the purview and meaning of Article 9 of Chapter 32, R. S. Mo. 1929.

Yours very truly,

James L. HornBostel,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

JLH:HR

FEES: Curators of Lincoln University not entitled to per diem and mileage except within the State and not for a greater distance than from Curator's home to place of board meeting.

January 10, 1936

FILED
2

Board of Curators,
Lincoln University,
Jefferson City, Missouri.

Mr. William J. Thompkins,
Recorder of Deeds,
Washington, D. C.

Gentlemen:

This will acknowledge receipt of a letter from the Board of Curators of Lincoln University which is as follows:

> "Will you please give us an opinion on the following matter:
>
> "The Board of Curators of Lincoln University meets at certain specified times and at these times it is the custom for the University to pay all expenses of each member incident to his attending the meeting. All members of the board have their permanent residences in the State of Missouri. We would like to know if it is legal for us to pay the expenses incurred by a member of the board incident to his attending the above mentioned meeting, if he, let us say, has his permanent residence in St. Louis, but is temporarily residing in New York where he is employed? Is it legal for us to pay his expenses from New York to Jefferson City and return?"

Also a letter from William J. Thompkins which is as follows:

> "I am, herewith, submitting to you, through the kindness of Senator Buford, a formal statement setting forth the facts justifying my rights as a member of the Board of Curators of Lincoln University to receive compensation, as such member, while engaged upon the business of the Institution to and from Washington, D. C."

Accompanying the latter letter is an enclosure of suggestions.

We construe your inquiry to be as follows: A member of the Board of Curators of Lincoln University has his legal residence in Kansas City and has employment in the City of Washington, D. C., where he spends part or all of his time in the performance of official duties there. A meeting of the Board of Curators of Lincoln University is held at Jefferson City, Missouri, and such member, who has his legal residence at Kansas City and who is at the time of the meeting and immediately prior thereto physically in the City of Washington, D. C., travels from Washington, D. C., to Jefferson City, Missouri, for the purpose of attending and does attend such meeting of the Board of Curators. Is he entitled to mileage from Washington, D. C., to Jefferson City, Missouri, and is he entitled to per diem or other expenses in so attending such meeting?

Section 9617 of Article 19 of Chapter 57, R. S. Mo. 1929, with respect to the qualifications of members of the Board of Curators of Lincoln University, provides:

> "There shall be no restrictions as to residence or politics except that all appointees shall be citizens of Missouri and shall reside within the state."

Section 9621, among other things, provides:

> " * * * the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln university shall be the same as those prescribed by statute for the board of curators of the state university of Missouri, except as stated in this article."

Section 9628 provides that the Board of Curators of Missouri University "shall receive their actual expenses,

which shall be paid out of the ordinary revenues of the university".

Any and all revenue obtained by the Missouri University must necessarily be from "public funds derived from taxes, fees, licenses or in any other manner prescribed by law", and members of the Board of Curators of Lincoln University are officials within the meaning of Section 11405. They, before entering upon the discharge of their official duties, must be appointed by the Governor and must have a commission issued to them by the Secretary of State, and are required to take the prescribed oath, and they therefore come under the provisions of Section 11405, and in order to receive their expenses they must comply with the provisions of said statute.

Section 11405 is as follows:

> "Whenever any official, employe or any other person shall travel at the public expense of the state and is paid or reimbursed from any public funds derived from taxes, fees, licenses, or in any other manner prescribed by law, the provisions herein set forth shall govern and no other.
>
> "(a) Before any person shall travel at the public expense as herein provided, such person shall have from the head of the department on whose account the travel is made a written authority stating the nature of the duty to be performed and the counties or places to be visited, provided that in the case of a person whose general duties require traveling a general authority for one year may be issued stating the general duties of such employe.
>
> "(b) This written authority shall state the maximum amount per diem that may be expended for board and lodging. The head of the department shall fix this amount at a just and reasonable figure based upon the duties of the person traveling and the nature of the duties to be performed and the state auditor in auditing such an account is hereby authorized to pass upon the reasonableness of the amount allowed by the authority.

"(c) Before any payment or reimbursement is made to any person on account of any traveling expenses, the original written authority provided herein shall be filed with the state auditor. All claims for reimbursement shall be submitted to the state auditor upon a form approved by him, which form shall contain the information herein provided. It shall be made out in duplicate and the original shall be sworn to by the person claiming payment or reimbursement, and the original shall remain in the files of the state auditor and the duplicate shall be retained in the files of the department granting the authority. The form shall contain the following information and in addition such other information as the state auditor may deem necessary and shall be uniform for all departments: Date and place expense was incurred. If account is for more than one day, it shall be itemized showing the amount of each day's expense and the purpose for which each day's expense was incurred. Transportation charge, sleeping-car fare, lodging and meals shall each be shown as separate items and the amount for each stated. If any item of expense exceeds one dollar ($1.00), it shall be supported by a sub-voucher or receipt signed by the person to whom payment was made by the official, employe or person traveling at the public expense as herein provided and such sub-voucher or receipt shall show in detail the information required by this section. Also the place and date. No official, employe or person traveling at the public expense shall submit any voucher or claim for partial payment or reimbursement on account of traveling expenses but such a voucher or claim must contain all and every expense incurred within the time it purports to cover. The oath or affirmation of the official, employe or person traveling at the public expense shall be in the following form:

> "I,_____, do solemnly swear, 'or affirm' the above claim is correct and just, that no part of the same has been paid, that the expense was necessary to the public business of the state, that payment was made out of personal funds and that I have not been reimbursed therefor, and I have not received and will not receive from any source whatever any payment of any part thereof except as provided by law."

It will be noted that this section is all-inclusive and in terms covers any person who shall travel at the public expense of the State and is paid or reimbursed from any public funds or in any manner prescribed by law.

Statutes respecting fees are strictly construed.

In the case of State ex rel. v. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this state declared as follows:

> "Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. * * *'"

And at page 29 the court says:

> "As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the

> payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions."

In the case of King v. Riverland Levee District, 279 S. W. 195, the court said, l. c. 196:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * ** Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

While the payment under consideration to a member of the Board of Curators of Lincoln University is reimbursement for expenses, the same rule of statutory construction applies to it that applies when compensation in the form of salary or fees is concerned. The same reason applies to each, that is, the safeguarding of the public revenue from improper or extravagant expenditure.

In construing a kindred statute which defined the fees to which a sheriff is entitled for transporting prisoners to the State Penitentiary from the jail of the county where the prisoner was convicted, this office held in an opinion dated July 5, 1933:

> "That the fees allowable to sheriffs, county marshals or other officers for the transportation of convicts to the State Penitentiary shall be estimated by the shortest possible route from the place of departure to the Penitentiary, whether that be by highway or by railroad. * * *"

It appears from the foregoing that the fair meaning of the law is that the member of the Board of Curators seeking reimbursement for expenses incurred in attending a board meeting is limited to the reasonable actual expenses incurred by him in going from a point within the State of Missouri to the place of meeting of the board, which point shall in no event be a greater distance from the place of meeting of the board than is said curator's home distant therefrom. To hold otherwise would be to open up the revenues to possible demands where curators might be in distant parts of the world and go from such point to the place of the board meeting. The Legislature evidently did not intend to authorize payment of such unusual or extraordinary expenses. Reason must not be lost sight of. It dominates the law. It does not justify payment under the guise of expenses of the cost of a trip from Hong-Kong to Jefferson City to attend a board meeting, and yet if such expenses be paid from Washington, D. C., to Jefferson City, Missouri, by the same course of reasoning, the curator, coming from Hong-Kong, would be entitled to his expenses from that point. The statute specifies that the curators "shall reside within the state" and evidently does not contemplate that they may be paid for a greater distance of travel than from their residence to the place of the board meeting.

We also call attention to the fact that the appropriation act appropriating money for Lincoln University does not provide in terms for the payment of traveling expenses outside of the State of Missouri, while the appropriation act for other parts of the state government or departments thereof, for instance, the appropriation act for the Attorney General's department, Laws of Missouri, 1935, page 22, calls for "traveling within and without the state", which would appear to be an additional reason why the Legislature did not intend that Lincoln University should pay traveling expenses of members of the Board of Curators beyond the State of Missouri.

A person who has incurred expenses on behalf of the State of Missouri or of Lincoln University in the proper discharge of his official duties with reference to the state institution, and for which there is no provision now made in the law for reimbursement therefor, has, of course, the opportunity of presenting his claim to the Legislature when it meets, and the Legislature may pass a special relief appropriation reimbursing him if they see fit to do so.

We find no provision in Article 19 of Chapter 57, R. S. Mo. 1929, nor in Article 20 of Chapter 57, to which Article 19 refers for certain purposes, which authorizes the payment of per diem to members of the Board of Curators of Lincoln University.

CONCLUSION

We are of the opinion that, regardless of Section 11405, R. S. Mo. 1929, a member of the Board of Curators of Lincoln University whose legal residence is at Kansas City, Missouri, and who is in the City of Washington, D. C., whether on business or pleasure, and whether for a day or a year, is not entitled to be reimbursed for traveling expenses from the City of Washington back to Jefferson City, Missouri, in order to attend a meeting of the Board of Curators of Lincoln University, nor is he entitled to any per diem allowance for the days spent in going to, attending or returning from such board meeting.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

COUNTY COLLECTORS: County Collector can not continue to collect income taxes or receive a commission for collecting the same after the income tax has become delinquent and certified to the State Auditor under Section 10136, Laws of Missouri, 1935, page 410.

July 23, 1936.

7-23

FILED
26

Eagleton, Waechter, Yost, Elam & Clark,
Attorneys at Law,
1020 Telephone Building,
1010 Pine Street,
St. Louis, Missouri.

Attention: Mr. Donald Gunn

Gentlemen:

This department is in receipt of your letter of June 22nd regarding William F. Baumann, Collector of the Revenue of the City of St. Louis. Your letter is as follows:

> "I am writing you as attorney for William F. Baumann, Collector of the Revenue of the City of St. Louis, and to request an opinion from your office on the following matter:
>
> "In 1935 the State Legislature repealed Section 10136 of the Revised Statutes of Missouri for 1929 and enacted in lieu thereof Section 10136 of the Laws of Missouri for 1935, page 410, which provides in substance that after delinquency of income taxes collectors of the various counties shall certify to the State Auditor the names of the persons or corporations so delinquent. This section further provides that within sixty days thereafter the State Auditor shall certify such names to the Attorney General's office and by this office suits shall be filed for the collection of such delinquent income taxes. At the discretion of the Attorney General, the Prosecuting Attorneys of the various counties may be requested to file such suits. Nowhere in this section does there appear any limitation or reduction of the powers of the collectors of the various counties, as such powers existed at the time of the passage of this act.

"Under Section 10124 of the Revised Statutes of Missouri for 1929, the collectors of the several counties and the City of St. Louis shall be the collectors of the income tax of the districts in which they live. Likewise, under Section 10133 of the Revised Statutes of Missouri for 1929, the compensation of the Collectors is designated as the same for income taxes as for other taxes.

"I take it from reading the two latter sections, neither of which were repealed or amended by Section 10136 of the Laws of 1935, that the Collector of the City of St. Louis is still empowered to collect income taxes even after the names of the delinquent taxpayers have been certified to the State Auditor and by him to the Attorney General. In other words, I understand the law to be that all money collected in the City of St. Louis in the way of income taxes, whether before or after delinquency, should pass through the hands of the Collector of the City of St. Louis.

"Since the passage of Section 10136 referred to above, however, the Collector of the City of St. Louis has received no taxes paid by any persons delinquent to the extent that their names were certified to the State Auditor as provided therein.

"Will you be good enough, therefore, to let me have the benefit of your opinion with reference to this matter, and at your earliest convenience."

The new section referred to in your letter, Section 10136, Laws of Missouri, 1935, page 410, is as follows:

"All taxes assessed on account of incomes shall become delinquent on the second day of June, where assessments are required to be made and certified to by the assessor prior to April 30, and subsequent to March 15; in all other cases taxes assessed on account of income, shall become delinquent thirty days after the tax book is required

by law to be delivered to the collector; within thirty (30) days after such delinquency the collector shall certify the names of the delinquent taxpayers to the State Auditor, and the State Auditor shall, within sixty (60) days thereafter, certify the names of any individuals, associations, joint stock companies, syndicates, co-partnerships, corporations, receivers, trustees, conservators, or other officers appointed by any state or federal court, from whom such tax is due, to the Attorney General, and suit shall be instituted in any court of competent jurisdiction by the Attorney General, or by the Prosecuting Attorney of the county at the direction of the Attorney General, in the name of the State, to recover such tax and enforce the lien therefor, and service may be had on both residents and non-residents in the same manner as provided by law in civil actions. The same penalties shall be assessed against such delinquent taxpayers as in the case of personal property taxes, except where different penalties are provided for by an act of the 56th General Assembly, and shown in the Laws of Missouri, 1931, at pages 365 to 375, both inclusive."

The repealed Section 10136, R. S. Mo. 1929, directed the collector to bring actions in the case of delinquent income taxes in the same manner as actions on personal property taxes are maintained. The new section, quoted supra, appears to have changed the mode of procedure in that the names of the delinquent taxpayers are to be certified to the State Auditor, and then in turn certified to the Attorney General. It would appear that it was the intention of the Legislature to permit the collector to attempt to collect all income taxes sixty days after the second day of June.

There are no decisions by our courts regarding this question, nor do we know of any pending at the present time.

We do not think there is any conflict in the present statute and the section regarding the compensation of collectors, that is Section 10133, R. S. Mo. 1929, which is as follows:

> "Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by assessors and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state."

We think the general rule in regard to decreasing the compensation of the collector is well stated by Judge Hays in the case of State ex rel. McKittrick v. Bair, 333 Mo. 1. c. 15:

> "The contract entered into between the collector and his attorney, and approved by the county court, imposes no liability upon either the State, county or the collector. It only fixes the status of the attorney as to his right to compensation and the amount thereof when in the tax suit the liability therefor becomes fixed upon the taxpayer's property by the final judgment in the case. (Butler v. Sullivan County, 108 Mo. 1. c. 638, 18 S. W. 1142.) And, as stated in State ex rel. Kemper v. Smith, 13 Mo. App. 1. c. 423, 'It is clear, then, that unless the proceeding result in collecting a sum of money belonging to the public revenue, neither the collector nor his attorney can claim any costs in the cause.' The same rule necessarily applies to the other interveners, who as public officers have no contractural right as to their terms of office or their compensation or any vested right in either, the same being subject to legislative control. (State ex rel. Attorney-General v. Davis, 44 Mo. 129; Givens v. Daviess County, 107 Mo. 1. c. 608, 17 S. W. 998; State ex inf. Crow, Attorney-General, v. Evans, 166 Mo. 347, 66 S. W. 355; Gregory v. Kansas City, 244 Mo. 523, 149 S. W. 466.) The fees of the collector and his attorney and of the interveners are subordinate to the general legislative power to impose, increase,

> diminish or remit penalties for tax delinquencies; and no vested right of any of them is impaired by the remission. (Jones v. Williams (Tex. Sup. Ct.), 45 S. W. (2d) l. c. 139, 140, and cases there cited.)"

The principle that a collector can not be held liable for failure to collect delinquent taxes under certain circumstances is discussed in the case of Carl v. Thiel, 277 S. W. l. c. 488:

> "Disposing of the other contention that the sheriff and his surety would be responsible for all taxes for which he receipted to the county clerk, except that which was delinquent and could not be collected, and for all of which he is required to make settlement at the expiration of his term, it may be said that such requirements were necessarily modified by implication by the provisions of the 1924 act involved in this case. Therefore, at the expiration of defendant's term, he may make his settlement, showing, among other things, the amount of uncollected delinquent taxes, although yet collectable by distraint or levy, and thereby obtain his acquittance the same as he could do before the enactment of the 1924 act, since neither the state nor the county could exact any more from him after he was deprived by the provisions of the 1924 act of the right to enforce collections by levy or distraint."

Applying the above decision to the question at hand, we think that the collector can not be held liable for any uncollected income taxes when the same are certified to the State Auditor as provided in Section 10136, Laws of Missouri, 1935. Therefore, he could not maintain that he is entitled to collect income taxes and claim his fees therefor after the delinquency has been certified to the State Auditor. In other words, it would appear that it was the intention of the Legislature for the collector to make his best efforts to collect sixty days after June 2nd, and if unable to collect the same, he should, as the statute states, certify the same to the State Auditor, who in turn certifies the same to the Attorney General. While it is true the collector still has the delinquent tax-

payer's name and the original assessment on file, yet we think he has lost jurisdiction of the collection of the tax and is no longer entitled to any compensation, nor to make any further effort in the collection of the tax, and that such was the intention of the Legislature.

Yours very truly,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:HR

CITIES OF FOURTH CLASS: Unless ordinances provide punishment for prisoner escaping custody, prisoner cannot be brought back from another county; if prisoner returns to city, he can be taken into custody and compelled to serve out remainder of sentence.

September 10, 1936.

9-11

FILED
26

Mr. T.H. Edwards, Mayor,
City of Salisbury,
Salisbury, Missouri.

Dear Sir:

This department is in receipt of your letter of September 5 wherein you request an opinion based on the following facts:

> "A few days ago, a man pleaded guilty to public drunkenness in our municipal police court, and I sentenced him and committed him to the city marshal, who turned him over to the street commissioner to work on the streets. He escaped from the custody of the street commissioner and probably fled to Moberly.
>
> "Tom Denny, city attorney, holds that we cannot have him picked up at Moberly. Tom says that it is absolutely not an offense under the state law, citing '268 Mo. 481', and he further says that as the man would have to be arrested under the original drunkenness charge, if at all, the city lacks sufficient authority to reach the man in Moberly.
>
> "I cannot agree with Tom in this. It seems unreasonable to me that an offender cannot be made to take his punishment after conviction, if he succeeds in escaping into another county."

It appears that Mr. Denny has made some research in regard to this question and it is our opinion that he is correct in his construction of the case of State v. Owens, 268 Mo. 481, wherein the Court said (l.c. 484-485):

> "It is a well established rule that criminal statutes must be strictly construed. Very appropriate to the discussion here is the language used by the Kansas Supreme Court in discussing a section (182) of the Kansas Code which appears to be almost an exact duplicate of Section 4381, Revised Statutes 1909. The court said:
>
> 'Section 182 has reference to persons confined in a county jail or held in custody going to such jail. As a rule, penal statutes must be strictly construed, and they cannot be extended beyond the grammatical and natural meaning of their terms, upon the plea of failure of justice. (Remmington v. State, 1 Ore. 281; State v. Lovell, 23 Iowa, 304; Gibson v. State, 38 Ga. 571.)
>
> 'We are not at liberty to interpolate into the statute "city prison" nor can we judicially determine that a "city prison" is a "county jail." It is therefore our opinion that the matters charged in the information do not constitute any offense within the statute. The omission is one for which the Legislature is responsible. It is probably a casus omissus, which the Legislature may, but the court cannot, supply.' (State v. Chapman, 33 Kan. 134)"

The decision in the case of State v. Owens was discussed in the case of State v. Betterton, 317 Mo. 307. The question involved in the Betterton Case was whether or not there was a variance between the charge and the proof when the evidence showed

that the defendant escaped from a prison farm, whereas the information charged him with escaping from the Missouri State Penitentiary. The court held that there was a fatal variance and that the defendant could not be prosecuted under that section. The Owens Case decides conclusively that the person who pleaded guilty to public drunkenness and was sentenced in your municipal court and subsequently escaped from the custody of the street commissioner did not violate any state statute and therefore could not be brought back to Chariton County and tried for jail breaking.

The only section of the statutes which we are able to locate which might have a bearing on the question is Section 6980, R.S. Mo. 1929, which is as follows:

> "All warrants issued by the mayor or police judge shall be directed to the city marshal, the sheriff or any constable of the county, and such warrant shall be executed by the marshal or any policeman of the city, or by the sheriff or any constable of the county, at any place within the limits of said county, and not elsewhere, unless said warrants are indorsed in the manner provided for warrants in criminal cases, and, when so indorsed, shall be served in other counties, as provided for warrants in criminal cases."

There is a vast difference between a crime and prosecution under a city ordinance and prosecution under a state statute. In the case of City of Richland v. Null, 194 Mo. App. l.c. 180-181, the court, in speaking of the power of a city in respect to prosecutions, said:

> "We shall adhere to the rules inssited upon by the defendant that plaintiff city can exercise only such powers as are granted in express words, or those necessarily incident to, or implied in the powers expressly granted; that the jurisdiction of the mayor, acting as police judge, is limited and must be exercised in strict conform-

> ity to the statute and that the complaint referred to in said sections 9332 and 9334 does not mean an indictment or information as used in our constitution and statutes governing prosecutions for criminal offenses; but in such a proceeding as is referred to and authorized by said sections. That 'complaint' is a technical term descriptive of proceedings before magistrates was held in Commonwealth v. Davis, 11 Pick. (Mass.) 432, 436. In 8 Cyc. 407 we find this definition: 'A form of legal process which consists of a formal allegation or charge against a party, made or presented to the appropriate court or officer, as for a wrong done or crime committed; in the latter case generally under oath..... In criminal practice, a charge, preferred before a magistrate having jurisdiction, that a person named (or an unknown person) has committed a specific offense, with an offer to prove the fact, to the end that a prosecution may be instituted."

Referring to Section 6980, supra, again, if the City of Salisbury has an ordinance with regard to prisoners breaking from the custody of the officers or from the city jail, then we are of the opinion that that Mayor or Police Judge could issue a warrant in compliance with Section 6980 and the person who has escaped could be arrested in the City of Moberly and returned to the City of Salisbury for prosecution under that charge. You do not state in your letter that the City of Salisbury has such an ordinance; therefore, we must assume for the sake or argument that no such ordinance exists, and as a result, as we have stated before, the person in question has committed no crime by leaving the custody of the street commissioner. Hence, we must look solely to the right of the City of Salisbury to return the person to the custody of the street commissioner, there to serve out the term imposed by the Police Judge under the charge of drunkenness.

Police officers are confined in the making of arrests to the limits of the city. They do not have the power to go to

some other county to make arrests nor to have the officers of the other county arrest for them persons who have escaped from their custody.

The right of the police officers of the City of St. Louis to make arrests in St. Louis County is discussed in the case of State ex rel. v. Stobie, 194 Mo. l.c. 61, as follows:

> "While the metropolitan police system was created by the State through its General Assembly, it was created for the city. The city and county of St. Louis, by the express provisions of the Scheme and Charter, were made separate, distinct and independent municipalities, and unless we are to absolutely ignore all the principles of local self-government, which has ever been the pride of this great Commonwealth, it must be held under the law now in force, that as police officers, relators were without authority to arrest offenders in St. Louis County for offenses committed in such county."

CONCLUSION

In the last analysis, the ordinances of the City of Salisbury must be the guide in this situation. If the ordinances do not contain any provision which would permit the return of the person in question, it is our opinion that the City of Salisbury does not have authority to return him. However, if this party should return to Salisbury and be found within the jurisdiction of the local officers, he may be again taken into custody and compelled to serve the remainder of his sentence.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

GWN:AH

BUS AND TRUCK LAW: Irregular route permit does not authorize servicing points serviced by regular route permit holders. Venue is in any county through which goods are illegally hauled.

January 7, 1936

HO

FILED
27

Honorable John A. Eversole,
Prosecuting Attorney,
Washington County,
Potosi, Missouri.

Dear Sir:

We are in receipt of your letter of December 12, 1935, wherein you state as follows:

> "I have a rather unusual question submitted to me and since I am not sure what to do I have decided to put the facts up to you.
>
> "We have two truck lines operating between Potosi and St. Louis over route 21 to 61 and 61 into St. Louis. They are operating under a common carriers permit under the bus and truck law of 1931.
>
> "We also have the Park Transportation Company of St. Louis, Missouri, operated under a contract haulers permit over irregular routes issued by the public service commission giving specialized service.
>
> "Recently the U. S. A. government under the W.P.A. let a contract to Evans and Howard Clay Products Company of St. Louis, Missouri, to furnish sewer pipe to construct a sewer system in Potosi, Missouri, said pipe to be delivered by the Howard Clay Products Co. in Potosi, before being accepted or paid for by the Government.
>
> "Later the Evans and Howard Clay Products Company let a contract with Park Transportation Company of St. Louis for the delivery of said pipes to Potosi.

> "While in the act of delivering said pipe, that is part of them, on Monday, December 9th, 1935, the drivers of Park Transportation Company were arrested in Potosi for operating trucks for hire under a contract haulers permit over a regular route, used by a common carrier. The complaint was made by a State Highway Patrolman who also made the arrest.
>
> "The case has been set for trial Monday, December 16, and since I am not at all sure what authority, if any, I have to ask a conviction, I am having the cases continued until I can get your opinion on the matter."

We are also in receipt of your letter supplemental thereto in which you state that the Park Transportation Company does not have a contract with the parties furnishing these pipes for the hauling.

We have examined the records of the Public Service Commission and they show that the Park Transportation Company was granted a permit No. T753X, with authority to

> "operate over an irregular route in intrastate commerce as follows: St. Louis to and from any point in the State of Missouri, subject to the limitations contained in the Missouri Bus and Truck Law of 1931 concerning the operation of a motor truck as a common carrier for hire over an irregular route * * *."

Section 5264, Laws of Missouri, 1931, pages 304-305, sub-section (g) states:

> "The term 'regular route,' when used in this act, means that portion of the public highway over which a motor carrier usually or ordinarily operates or provides motor transportation service."

Sub-section (h) thereof states:

> "The term 'irregular route,' when used in this act, means that portion of the public highways over which a regular route has not been established."

Section 5267, in part, provides as follows:

> "(a) The public service commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications, and rules and regulations pertaining thereto; * * * and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public."

The rights of holders of permits for regular routes and for irregular routes are set forth in Section 5267, as follows:

> "(d) A motor carrier not operating over a regular route may, within the territory permitted to be served by him, receive persons or property at a point located on a regular route and destined to a point not located on a regular route, and receive persons or property at a point not located on a regular route and destined to points on a regular route.
>
> "(e) It shall be unlawful for any motor carrier, except one having a certificate of convenience and necessity authorizing such service, to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points, and any motor carrier so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this act."

Section 5270, in part, provides as follows:

> "(b) The public service commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all contract haulers as herein defined.

"(c) Article 6 of the public service commission law is hereby made applicable to all such contract haulers.

"(d) A contract hauler may receive persons or property at a point located on a regular route and destined to a point not located on a regular route and receive persons or property at a point not located on a regular route and destined to points on a regular route.

"(e) It shall be unlawful for a contract hauler to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points and any contract hauler so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this act."

Section 5275 provides as follows:

"Every owner, officer, agent, or employee of any motor carrier, contract hauler, and every other person, who violates or fails to comply with or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the commission, and who procures, aids, or abets any corporation or person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation thereof shall be guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

The Motor Vehicle Law of Missouri with reference to the right of the State to declare classifications of uses of its highways has been upheld as constitutional by the Federal Court.

In the case of Schwartzman Service, Inc. v. Stahl, 60 Fed. (2d) 1034, l. c. 1037, the court said:

> "At the outset it must be acknowledged that the state has the power to regulate and control the movements of motor vehicles over its highways. This it may do in the interest of public convenience and safety and for the protection of the highways. Provisions of this character have been uniformly sustained. Buck v. Kuykendall, 267 U. S. 307, loc. cit. 314, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286; Stephenson v. Binford et al. (D. C.) 53 F. (2d) 509.
>
> "Moreover, while 'a citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle,' yet 'he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause.' Packard v. Banton, 264 U. S. 140, loc. cit. 144, 44 S. Ct. 257, 68 L. Ed. 596.
>
> "The highways belong to the state. It may make provisions appropriate for securing the safety and convenience of the public in the use of them. Kane v. State of New Jersey, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222.
>
> "Assuming, therefore, the power and right of the state to regulate and supervise its highways, such right cannot be hampered or restricted within narrow bounds. On the contrary, to the end that such right might be fully enjoyed and exercised, there is a constant recognition of the principle that the state 'has a broad discretion in classification in the exercise of its power of regulation.' Smith v. Cahoon, 283 U.S. 553, loc. cit. 566, 51 S. Ct. 582,

587, 75 L. Ed. 1264. Upon such classification, no person can interpose an objection, save only in those cases where the classification or discrimination is entirely arbitrary.

"Every presumption must be indulged in favor of the constitutionality of the law. While validity of a statute cannot stand upon legislative declaration alone, yet the rule is that 'the legislative declaration of purpose and policy is entitled to gravest consideration, and, unless clearly overthrown by facts of record, must prevail.' Foster Packing Co. v. Haydel, 278 U. S. 1, 49 S. Ct. 1, 73 L. Ed. 147; Stephenson v. Binford (D. C.) 53 F. (2d) 509, loc. cit. 514.

"The rule was well stated in Continental Baking Co. v. Woodring (D. C.) 55 F. (2d) 347, loc. cit. 353, wherein Judge McDermott of the Tenth Circuit said: 'When the Legislature acts within the scope of its legislative power, when no facts are disclosed as to the reasons which actuated the legislation, the presumption of constitutionality stands, unless no fair reason can be ascribed for the legislative action. Hardware Dealers' Ins. Co. v. Glidden (284 U. S. 151), 52 S. Ct. 69, 76 L. Ed. 214; O'Gorman v. Hartford Ins. Co., 282 U. S. 251, 51 S. Ct. 130, 75 L. Ed. 324; Standard Oil Co. v. Marysville, 279 U. S. 582, 49 S. Ct. 430, 73 L. Ed. 856. That a legislative classification should stand, "if any state of facts reasonably can be conceived that would sustain it"; that the burden is on the assailant to show that the classification is "essentially arbitrary."'

"With the foregoing principles of law in mind as postulates, the constitutionality of the provision assailed may be considered. The alleged discriminatory or unequal provisions apply alike in favor of both common carriers and contract haulers when their

motor vehicles are 'used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market.'"

The authority of the Legislature to delegate to the Public Service Commission power to prescribe and promulgate reasonable rules and regulations has been upheld in the cases following:

State ex inf. Killam v. Colbert, 201 S. W. 52, 273 Mo. 198;
State ex rel. City of Sedalia v. Public Service Com. of Mo., 204 S. W. 497, 275 Mo. 201;
State ex rel. City of Sedalia v. Public Service Com. of Mo., 40 S. Ct. 342, 251 U. S. 547, 64 L. Ed. 408;
City of St. Louis v. Public Service Com. of Mo., 207 S. W. 799, 276 Mo. 309;
City of St. Louis v. Public Service Com. of Mo., 207 S. W. 805;
State v. Freeland, 300 S. W. 675, 318 Mo. 560;
Arnold v. Hanna, 290 S. W. 416, 315 Mo. 823, Judgment affirmed (1928), 48 S. Ct. 212, 276 U. S. 591, 72 L. Ed. 721;
State ex rel. v. Thompson, 60 S. W. 1077, 160 Mo. 333, 54 L. R. A. 950, 83 Am. St. Rep. 468.

The Public Service Commission of Missouri in interpretating the Bus and Truck Act of 1931, Section 5267, sub-section (e), states:

"It is deemed that a certificated carrier operating on a regular route who fails to offer specialized service, such as refrigeration, uncrated furniture hauling, hauling of heavy machinery and the like, is not operating as a common carrier as to such service, and an irregular carrier who does offer such specialized service may be licensed by the Commission to perform such service from point to point on the route of such certificated carrier."

It does not appear that the materials transported in the instant case come within the classification set forth in the rule or interpretation set forth next hereabove.

And for the purpose of this opinion, we take it for granted that the holders of regular route permits are equipped to service and ready to service the public in transporting the material under consideration from St. Louis to Potosi, and that this is an intrastate shipment.

The route from St. Louis to Potosi being a regular route for one or more holders of such permits, and the route or permit granted to the Park Transportation Company being an irregular route, it follows that the Park Transportation Company does not have the legal right to transport goods or materials over said regular route from St. Louis to Potosi and deliver them to points thereon that are serviced by the regular route permit holders.

While Section 5270 (e) prescribes that it shall be unlawful for a contract hauler to "accept" property for transportation from a point on a regular route destined to a point on a regular route, etc., and that the offending person is punishable as provided by Section 5275, said sub-section (e) does not appear to be the only penalty section for violation of the Bus and Truck Law, and, moreover, it covers only contract haulers. Section 5275 is the general penalty section (and indeed is the section prescribing the amount of penalty for contract haulers) and defines the prohibited class to be any person who

> "violates or fails to comply with or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the Commission, * * * shall be guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

Under this provision, any person who violates this law may be punished, and the criminal act is the prohibited transporting of the material as well as the acceptance of the material for such purpose, and the party so offending may be

prosecuted in any county through or into which he so illegally transports the material. The transporting of the material for ever so short a distance within a county under such conditions is an illegal act for which the offending person may be prosecuted.

CONCLUSION

It therefore appears that the route over which the Park Transportation Company is transporting the materials in question is serviced by holders of regular route permits, and that the Park Transportation Company is not authorized by law to so transport said materials from St. Louis to Potosi, Missouri, and that if it is so transporting them, it is subject to prosecution therefor, and the venue for such prosecution may be in any county into or through which such goods are so illegally transported.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

RECORDER'S FEES: Recorder of Deeds is not entitled to compensation for making certified copies, but is entitled to fifty cents for his certificate.

1-16

January 10, 1936.

FILED
27

Hon. John P. English,
Recorder of Deeds,
St. Louis, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "On October 17th, 1935 we issued two certified copies of Trust Deeds to a Mr. O'Herin, as you will note in the enclosed correspondence which I forward to you.
>
> "This matter is now in the hands of Mr. John Dickinson, Ass't. Attorney General, whom I advised how we derived the prices of the above copies.
>
> "I advised him that we operate under Section 11805 of the State Statutes when making a certified copy of our records. This being the only Section covering a fee for the issue of same, this office has been authorizing a fee of 15¢ per 100 words as described in said section. If you will be kind enough to take this matter further with Mr. Dickinson it will be greatly appreciated, as you will note I referred him to you.
>
> "After consulting our correspondence with Mr. Dickinson, kindly advise me as to your opinion."

Along with the same is attached correspondence with Mr. John Dickinson, Assistant Attorney General, Department of Justice, Washington, D. C.

Section 11805, R. S. Mo. 1929, referred to by you, does not apply to the amount of fees to be charged by your office for copying and authenticating records on file therein. That section states: "The state shall be entitled to fees for services to be rendered by the secretary of state as follows", and the provisions thereof with reference to fees apply only to the fees which may be charged by the secretary of state's office.

Section 11804 is the section which prescribes the fees which may be charged by recorders for their services, and sets them forth as follows:

"For recording every deed of instrument, for every hundred words	$ .10
In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.	
For every certificate and seal	.50
For recording a plat of survey, if not more than six courses	.40
For every course above six of the same..	.02
For copies of plats, if not more than six courses	.40
For every course above six	.02"

Section 1692 provides as follows:

> "In all cases where the original of any bond, contract or other instrument, for the recording of which provision has been made by law, shall appear to be lost, or not within control of the party wishing to use the same, the record thereof, or a transcript of such record, certified by the custodian thereof, under the seal of his office, may be read in evidence without further proof, in like manner and with like effect as in the case of the loss of duly recorded instruments affecting real estate."

Sections 11561, 3048, 3049, 3039 and 3057 define certain powers of the recorder of deeds, but we do not find any statute in Missouri which makes it the duty of the recorder of deeds to furnish certified copies of instruments on file in his office.

Statutes with respect to fees must be strictly construed and compensation to the recorder for his official services performed is allowed only where there is statutory provision made for the payment thereof. If there is no statute providing for his compensation, he is not entitled to compensation, notwithstanding the law may make it his official duty to perform certain services.

In the case of State ex rel. Troll v. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this state says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed vs. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In the case of State ex rel. v. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this state declares as follows:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office.

"Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract but because the law attaches it to the office.'

"Mechem on Public Offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth.' * * * *

"In Bank v. Refrigerating Co., 236 Mo. 414, Brown, J., speaking for the court, says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. * * *'"

And at page 29 the Court says:

> "As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions."

In the case of King v. Riverland Levee District, 279 S. W. 195, the court says, l. c. 196:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. * * * * Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

It would seem that if the Legislature's attention was called to the fact that there is no statute authorizing compensation to a recorder of deeds for making certified copies of instruments in his office, that body would remedy the situation, but until they have so remedied it by passing a law which clearly gives the recorder such compensation, he is not entitled to it. We can only construe the law as written.

CONCLUSION

It is our opinion that the recorder of deeds is not authorized by law to collect a fee for making certified copies of instruments on file and of record in his office, but he is entitled to a fee of fifty cents for affixing his certificate to copies thereof when made.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

TAXATION: Right to compensation for improvements by certificate holder upon improvements made by certificate holder.

2-6

February 3, 1936.

FILED 27

Honorable Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Englehart:

Acknowledgment is herewith made of your communication of January 24, 1936, requesting an opinion of this office on the following matter:

> "If you have prepared an opinion on the meaning of the last provision of the above quoted section, hereinafter set out, or if you have not prepared an opinion oh it, please write me your opinion as to its meaning and application.
>
> The above quoted section provides the manner of payment of improvements made and erected on land purchased at a delinquent tax sale and the last provision therein is as follows, to-wit, 'No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes.' Section 9956a, Laws 1933, page 437, provides that no owner may redeem the land sold for taxes, if not redeemed within two years from the time of sale. I do not understand the meaning of the last provision of section 9956d when read in connection with section 9956a. If the last provision of section 9956a is followed there is no compensation at all for improvements made on lands purchased at tax sales. If the purchaser cannot redeem after two years from the date of the sale, why is

> section 9956d written in the statutes, setting out how the owner shall compensate the purchaser at the tax sale, if the owner does not have to pay for improvements that were erected within two years after the date of sale?"

One place in your communication you have referred to Section 9956d. I presume that that should read "9956c", and shall reply to your inquiry on that supposition. Section 9956a provides for the redemption of land from tax sale and provides in part:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing,* * *"

However, I direct attention to the provisions of Section 9956b which provides:

> "Infants, idiots, insane persons and persons in confinement may redeem any lands belonging to them sold for taxes, within two years after the expiration of such disability, in the same manner as provided in the preceding section for redemption by other persons."

Thus we see that by this section the redemption period in certain cases might be extended materially beyond the ordinary expiration date. It might be ten years or more before the minor becomes of age and two years thereafter would be allowed him within which to redeem the property. During that ten years or so the purchaser at the tax sale might have made valuable and lasting improvements and under the provisions of Section 9956c he would be permitted to obtain payment of the reasonable value of such improvements. It is quite true that this section closes with this sentence:

> "No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes.

It is thus apparent that the Legislature did not intend that a tax sale purchaser could obtain possession of the property under Section 9954a at the expiration of one year from the date of the sale and make such valuable and lasting improvements thereon as it would make it impossible for the distressed taxpayer to redeem the land from the sale. It is our view that this is the construction to be placed upon this law and that given such construction it presents a somewhat workable plan.

CONCLUSION.

It is therefore the opinion of this office that the holder of a certificate of purchase cannot obtain payment for valuable and lasting improvements made before the expiration of two years from the date of the sale and that such provision is consistent with Sections 9956a and 9956b.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HGW:MM

INHERITANCE TAX: Legacy of U.S. bonds or other government securities not exempt from provisions of inheritance tax laws of State of Mo.

2-19

February 17, 1936.

FILED
27

Hon. John A. Eversole,
Prosecuting Attorney,
Washington County,
Potosi, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following question:

> "Will your office please furnish me with an opinion as to whether United States Government Bonds, which are exempt from other taxation, are subject to the payment of inheritance tax under our Missouri Statute?"

In the first place, the Missouri Inheritance Tax is not a tax on property, but is an excise tax on the right to receive property. In Re Rosing's Estate (Supreme Court of Missouri), 85 S.W. (2d) 495. Since the tax is not on the property transferred, it would seem to make little difference that the property transferred was comprised of government bonds.

In the case of In Re Sherman, 153 N.Y. 1, Chief Judge Andrews said:

> "The so-called tax is an exaction made by the state in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate. Whatever the form of the property, the right to succeed to it is created by law, and if the property consists of government securities, the transferee derives his right to take them as he does his right

> to take any other property of the decedent, under the laws of the state, and the state by these statutes makes the right subject to the burden imposed."

And, in the case of Plummer v. Coler, decided by the Supreme Court of the United States, 44 L. Ed. 998, the Court held that a legacy of United States bonds was not exempt from the inheritance tax laws of New York. Specifically, the Court said (1008):

> "We think the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed."

CONCLUSION

In view of the foregoing, it is the opinion of this department that a legacy of United States Bonds, or other government securities, is not exempt from the provisions of the inheritance tax laws of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

ELECTIONS: Absentee ballots - An absentee voter may vote his ballot immediately upon receipt of same or on any day prior to and including day of election. Elector voting absentee ballot must be within the confines of the State of Missouri.

September 30, 1936.

10-1

FILED
27

Mr. O. M. Ennes,
Clerk of County Court,
Barry County,
Cassville, Missouri.

Dear Sir:

We are in receipt of your letter of September 28 and tender you the following in reply thereto. Your letter is as follows:

> " * * * Is it the intention of the law and in your opinion would it be legal for a voter who is to be absent from his county on election day to come into the County Clerk's office of his home county six days before election, make application and at the same time vote his ballot before said county clerk, provided, of course, that the ballots are in the hands of the clerk? Would there be any difference if a voter was to be out of the State on election day?"

In 1935, the Legislature repealed Section 10182, which was passed by the 1933 Legislature, and enacted Section 10182 (Laws of Mo. 1935, p. 264) relating to absentee ballots, which provides as follows:

> "Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, or by mail, to the county clerk or, where existing, to the

> board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

Under the provisions of the above section, the voter may make application not more than 30 or less than 5 days prior to the day of such election.

Referring to the original sections repealed and amended in 1933 (Laws 1933, pp. 218-225 inclusive), we note by Section 10185 (p. 222) that the time limit for returning an absentee ballot is 6:00 P.M. of the day next succeeding the day of the election. The pertinent part of said section is as follows:

> "Such officer shall then write or print upon said envelope the following: 'Absentee ballot of (insert name of voter) marked and sealed in my presence' which certificate shall be signed by such officer and his official title noted thereon, and the envelope shall be by such voter sent by mail, postage prepaid, to the officer issuing the ballot, or, if more convenient, it may be delivered in person and such official issue his written receipt therefor, but in any event it must be returned into the hands of the issuing official not later than 6:00 o'clock P.M. of the day next succeeding the day of such election."

CONCLUSION

It being only necessary for the voter to execute his absentee ballot before a person authorized to administer oaths in the State of Missouri, it is the opinion of this department that an absentee voter may vote his ballot immediately upon receipt of the same, or at any time prior to and including the day of the election.

By the terms of Section 10185, supra, we are of the further

opinion, in answer to your specific question, that the elector may apply in person to the County Clerk or to the Board of Election Commissioners, receive his ballot and vote the same before the County Clerk at one and the same time.

In regard to your inquiry, to-wit, "would there be any difference if a voter was to be out of the State on election day", we are of the opinion this would make no material difference, as the main requisite is to the effect that the voter when voting the absentee ballot must be within the confines of the State of Missouri. As to his actions or whereabouts after voting, we think the same would be immaterial and of no consequence.

Very truly yours,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

JWH:AH

BLIND PERSONS:)
)
BLIND PENSIONS:)

In an estate by the entirety each owns the whole.

February 14, 1936. 2-15

FILED
29

Miss Marie M. Finan
Pension Secretary
Missouri Commission for the Blind
4342 McPherson Avenue
St. Louis, Missouri

Re: Emmett N. Sage
#20 Shelby County.

Dear Miss Finan:

This is to acknowledge your letter which, in part, reads as follows:

"The above has been on the blind pension roll since March 4, 1930. We were advised his wife had inherited some money from her mother who passed away in October 1934 and made an investigation of the case. We learned that the total estate of the deceased mother was $4326.70 and after all expenses were paid there was a balance of $3630.84 which was inherited by Mrs. Sage as the only heir. Part of this was a house in which Mr. & Mrs. Sage are now living and which has been appraised at $500.00.

"In addition to this inheritance of $3630.84 our investigation disclosed that Mr. & Mrs. Sage owned jointly an 80 acre farm valued at $2150.00 and a house and ten acres valued at $1190.00. Mrs. Sage advised our investigator she had been forced to sell some of the bonds which she had inherited and at the time of our investigator's call on November 14, 1935, Mrs. Sage advised she still had $3400.00 of her inheritance.

"We, therefore, notified Mr. Sage that it would be necessary to strike his name from the blind pension roll, since the blind pension law under Section 8893 provides that no blind person who lives with a sighted husband or wife who has property or an interest in property to the value of $5000.00 or more shall be eligible to receive the pension.

"We further advised him that Mrs. Sage had property because of this inheritance in the amount of $3400.00 which plus the farm at $2150.00 and the house and ground at $1190.00 made a total of $6740.00 which is more than the $5000.00 limit allowed by the blind pension law.

* * * * * *

"We will much appreciate if you will advise whether or not under the circumstances Mr. Sage is eligible to receive the blind pension, and if we have interpreted the law relative to property owned jointly and have erred in notifying him he is to be stricken."

Section 8893, R. S. Mo. 1929, provides in part as follows:

"Provided that no such person shall be entitled to a pension under this article * * * * who lives with a sighted husband or wife who * * * * has property or an interest in property to the value of five thousand ($5000) dollars or more."

You will note that the above statute uses the words "has property or an interest in property."

The facts in your letter show that Mr. Sage is blind and has a sighted wife who inherited and now has a separate estate of the value of $3400.00; that pensioner Sage and his wife own as tenants by the entirety, property of the value of $3340.00. Therefore, does Mrs. Sage, the sighted wife of pensioner, have property or an interest in property to the value of $5000.00 or more?

There is no question but that Mrs. Sage's separate estate amounts to $3400.00 as shown by your letter, and that she likewise has an interest in an estate by the entirety. And if her interest in said estate by the entirety amounts to $1600.00, or more, pensioner would not be entitled to remain on the pension roll. Thus, the only question presented for determination is to ascertain Mrs. Sage's interest in property held by the entirety or jointly with her husband.

Section 3114, R. S. Mo. 1929, provides as follows:

> "Every interest in real estate granted or devised to two or more persons, other than executors and trustees and husband and wife, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy."

In Wharton et ux. v. Citizens Bank of Bosworth, 15 S. W. (2d) 860, the Kansas City Court of Appeals, in discussing "estates by the entirety," said the following (page 862):

> "At common law man and wife were considered as one. In Missouri the enabling statutes have given a married woman power to contract and to convey her property; but so far as estates by the entirety are concerned, the ancient conception of man and wife still lives. As one, they are endowed with characteristics of a legal entity that has power to own real and personal property, subject the property to liens and charges,

> and to contract debts, which, when reduced to judgment against the entity (a joint judgment against both spouses), will permit its property to be sold under an execution on that judgment. None of these things may be accomplished by dealing with or against either spouse, but only by dealing with or against them jointly. But man and wife do not constitute an artificial person. It is impossible to obtain a judgment against the entity, independent of a judgment against its natural members. The judgment must be against the husband and wife. Such a judgment has all the characteristics of a joint judgment against codebtors, so that the property of each may be seized under execution for the satisfaction of the full amount of the judgment. But it has another characteristic. It will support the levy of an execution upon the estate by the entirety. There is no other method of subjecting this estate to the satisfaction of a debt, without the aid of a lien voluntarily created by the husband and wife."

In Wimbush v. Danforth et al., 238 S. W. 460, the Supreme Court of Missouri said the following (l. c. 466):

> "The character of the estate known as an estate by the entirety has long been firmly intrenched in the law of this state * * * * * * * * * * * * * * With the adoption of the common law doctrine, there was necessarily adopted the attributes of the estate, viz: That neither the husband nor wife was seized of moieties but of entireties, each being the owner of the entire estate * * * *. In Wilson v. Frost, 186 Mo. l. c. 319, 85 S. W. 377, 105 Am. St. Rep. 619, 2 Ann. Cas. 557, Judge Valliant, in speaking of this

estate said:

> "'In an estate of the entirety, the husband and the wife during their joint lives each owns, not a part, or a separate or a separable interest, but the whole, and therefore the death of one leaves the other still holding the whole title as before, with no one to share it."

See also: Locksmax v. Cramer et al., 216 S. W. 575; Frost v. Frost, 200 Mo. 474; Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159.

The Court of Civil Appeal of Texas in the case of Mercury Fire Insurance Co. v. Duneway, 74 S. W. (2d) 418, l. c. 419, said:

> "The rights of the husband and wife in community property are unified and equal and their title thereto and interest therein is the same. (Cases cited.)"

What, then, is Mrs. Sage's interest in property held by the entirety with her husband?--a one-half interest?- a one-third interest?- or a whole interest?- or any interest?

The Missouri decisions are unanimous to the effect that in estates by the entirety each owns the whole interest. Note the language of the court in Wimbush v. Danforth, supra, to the effect that the husband and wife in an estate by the entirety each owns, not a part, or a separate or a separable interest, but the whole of the estate. Thus, if Mrs. Sage owns the whole of the estate, then, of course, her interest in the estate amounts to the full value of the estate, or , as stated in your letter, the sum of $3340.00.

The pension law is for the aid of indigent deserving blind persons. The Legislature, in our opinion, did not intend that persons having property or an interest in property exceeding the value of $5000.00 should be entitled

to the benefits of the pension act. Using the figures contained in your letter, as to the interest Mrs. Sage has in property, shows a total amount of $6,740.00, and, if said figures are true and correct, it would be our opinion that under and by virtue of Section 8896, R. S. Mo. 1929, that said pensioner should be removed and stricken from the pension rolls. While it might be a harsh act to remove pensioner, yet no alternative is permitted. In this connection, we are reminded of the language of the Supreme Court of Missouri, en banc, in the case of State ex rel. Palmer v. Thompson, 297 S. W. 62, when the court said:

> "Respondent simply did his unpleasant duty under the law when he struck the name of relator from the blind pension rolls under the circumstances."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

BLIND PENSIONS: "Income," as found in Section 8893, R. S. 1929, discussed and defined.

February 28, 1936. 3/3

FILED 29

Miss Marie M. Finan
Pension Secretary
Missouri Commission for the Blind
4342 McPherson Avenue
St. Louis, Missouri

Dear Miss Finan:

This is to acknowledge your letter dated February 21, 1936, wherein you request an opinion relative to the words "income" and "recipient," found in Section 8893, R. S. Mo. 1929. Your letter reads in part as follows:

> "A previous ruling provides no distinction between net or gross income and based on this ruling we have been striking from the roll pensioners engaged in business who have been the recipients of more than $600.00 per year, or whose sighted spouses have been the recipients of $600.00 or more per year from any source whatever. We have likewise, rejected the applications of persons whose income or whose sighted spouses income is more than $600.00 per year.
>
> "We now have a case of a pensioner whose sighted wife operates a store and who states her daily receipts amount to $6.00 or $8.00 per day which of course is gross, and he is protesting the action of the Commission in striking him from the roll.
>
> "Will you please be so kind as to furnish us with an opinion covering this section of the law."

Section 8893, referred to in your letter, lists the qualifications for persons eligible to receive pensions and no person is entitled to a pension unless such have the necessary qualifications. The Legislature provided that a person having an income or the recipient of $600.00 per annum, would not be entitled to the benefits of the blind pension act; Section 8893, supra, having this proviso:

> "Provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatever, * * * * or who lives with a sighted husband or wife who has an income or is the recipient of six hundred ($600.00) dollars or more per annum from any source whatever * * *"

A reading of the sections pertaining to pensions for deserving blind people show that the Legislature intended the pension to be used for the purpose of maintaining and supporting said persons. It follows that a person who is being maintained, or has sufficient income or funds with which to supply daily wants, would not be eligible to the pension.

A pension is in no sense a contractual obligation. It is merely a bounty, a gratuitous allowance which arises purely from the graciousness of the State. One has neither a property nor a vested right in it. Corpus Juris, Vol. 48, page 786, enunciates the above rule as follows:

> "Pensions, it is said, are mainly designed to assist the pensioner in providing for his daily wants. A pension is not a matter of contract, and is not founded upon any legal liability. No man has a legal vested right to a pension; it is a mere bounty or gratuity given by the government * * * * * * And although existing pension laws may entitle one to a pension

> the government may, at its pleasure, at any time, change the amount thereof or revoke or destroy it altogether."

The narrow question presented for our opinion concerns the definition to be given to the words "income" and "recipient," found in Section 8893, supra. We do not find any case in Missouri that defines the word "income" as used in Section 8893. However, Corpus Juris, Vol. 31, page 396, says the following in defining "income":

> "'Income' is a broad, comprehensive, flexible, inclusive, and generic term, capable of definition. Although it has a well defined meaning, not only in common speech, but also under judicial construction, there appears to be some difficulty about its precise and scientific definition. * * * Generally the term may be defined as meaning all that comes in; * * * that which has come in; * * * that which comes in, not that which comes in less an outgoing; * * * the gross amount received by a person; * * * what a person can add to his stock or spend; what comes in; what has come in; * * *"

Corpus Juris in the same volume also calls attention to the fact that there are two kinds of income, namely, gross income and net income, and "gross income" is defined at page 401, Vol. 31, as follows:

> "'Gross Income. A term whose construction and meaning depend upon the context and subject matter; the entire amount that the use of the principal yields; the total receipts from a business before deducting expenditures for any purpose. As applied to a partnership, the entire profit arising from the conduct of the business. It may be equivalent to

> 'gross proceeds' or 'gross receipts.' However, the words 'gross income' may not mean 'gross receipts.'"

"Net income" is defined at page 402, Corpus Juris, supra, as follows:

> "Net Income. While generally the word 'income' has a different signification from 'net income,' the usual and ordinary meaning of the word, when used alone, may be 'net income;' and in the ordinary commercial sense, the term may, especially when connected with the word 'rent,' mean net or clear income. 'Net income' imports a 'gross income,' and the difference between the two implies the expenditure of income for some purpose. 'Net income' cannot be understood to mean 'gross profits.' Dividends are not 'net income.' * * *"

"Recipient" is defined by Webster's New International Dictionary as follows:

> "to receive; a receiver; as the recipient of a favor; now commonly used of persons only;"

We believe that the Legislature did not intend to definitely define "income" as used in Section 8893, supra, or to prescribe any hard and fast definition thereof, but left it flexible and to the particular case; in other words, if a pensioner was the recipient of having his daily wants supplied, the value of such would be a factor and considered "income." If a person is working on a salary and receives a stipulated sum per month, and the amount received per month would exceed $600.00 per annum, clearly that person would not be entitled to a pension. Of course, the amount the pensioner received would be used by him to supply his daily wants, such as food, clothing, fuel etc. If a pensioner was engaged in business

and the business yielded an amount exceeding $600.00 per annum, then said pensioner would be the recipient of a sum of money from a business.

In the case you present, nothing is shown as to what amount of money the store gives to pensioner's sighted wife. True, the store might take in $6 or $8 per day but that would be gross income taken in by the store and not by the pensioner. Thus if pensioner did not receive $600.00 per annum by virtue of the operation of the store, then, clearly, pensioner would not be the recipient of a sum sufficient to strike his name from the pension roll. You will readily understand then that it is a matter of applying the facts to ascertain the income the pensioner receives. In this connection we are constrained to the statement found in Corpus Juris, supra, page 402, wherein it says:

> "While generally the word 'income' has a different signification from 'net income,' the usual and ordinary meaning of the word, when used alone, may be 'net income;"

We also invite your attention to an opinion rendered to your Commission on December 2, 1933, wherein we held:

> "The $600.00 per annum is merely a yard stick to measure the need of the person, and whether the amount is received for an actual calendar year or is received for a space of time consecutively aggregating a year is of no importance.

While the statute uses the words "Six Hundred Dollars", we believe that if a pensioner has a store that is supplying daily wants, such as food, clothing, fuel etc., that the items so supplied for necessaries by the store could be calculated and the value of such considered "income," and as authority for said statement we invite your attention to State ex rel. Bolen v. Frear, 148 Wis. 456, 134 N. W. 673, wherein the court, at page 691, said the following:

"In this connection, though not perhaps in its logical order, may be considered the objection to that provision of the act which directs that the estimated rental of residence property occupied by the owner shall be considered as income. It is said that this is not income, and that calling it income does not make it income. It may be conceded that things which are not in fact income cannot be made such by mere legislative fiat, yet it must also be conceded, we think, that income in its general sense need not necessarily be money. Clearly it must be money or that which is convertible into money. The Century Dictionary defines it as that which 'comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital,' etc. The clause was doubtless inserted in an effort to equalize the situation of two men each possessed of a house of equal rental value, one of whom rents his house to a tenant, while the other occupies his house himself. Under the clause in question, the two men with like property are placed upon an equal footing, and in no other way apparently can that be done. Under the English income tax laws, it has been held that where a man has a residence or right of residence which he can turn into money if he chooses, and he occupies the residence himself, the annual value of the rental forms part of his income. Corke v. Fry, 32 Scottish Law. Rep. 341. We discover no objection to the provision in question."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

JLH:RG

CITIES OF THE THIRD CLASS: It is not compulsory for cities of the third class to carry Workmen's Compensation Insurance for employes of Electric Light and Water Plants.

PAUPERS: County Court should bear expense of burying paupers in cities of the third class.

July 13, 1936

7-15 FILED 29

Mr. W. C. Fisher,
City Clerk,
Hannibal, Missouri.

Dear Sir:

We are in receipt of your letter of June 18th, requesting an official opinion, which reads as follows:

> "Is it compulsory for municipalities to carry Workmen's Compensation Insurance? I mean by this all departments including Electric Light and Water Plants, which are municipally owned. If it is compulsory, is there any way to carry it without paying an exorbitant premium to the insurance companies.
>
> "We pay a tax to the County which I understand is to pay for the care of patients at the infirmary and also the burial of paupers in the City of Hannibal. We have been paying for the burial of our paupers, but recently we have been informed that the County should pay this expense out of the taxes collected from the City of Hannibal for that purpose.
>
> "We are a City of third class and working under a special charter and not exempt on any taxes."

In answering your inquiry we shall take the questions in the order in which they appear.

(1) "Is it compulsory for municipalities to carry Workmen's Compensation Insurance? I mean by this all departments including Electric Light and Water Plants, which are municipally owned."

It is the opinion of this department that it is not compulsory for a municipality to carry Workmen's Compensation Insurance in this instance.

Section 3300, R. S. Mo. 1929, reads in part as follows:

> "Every employer and every employe, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter * * *."

Section 3303, R. S. Mo. 1929, reads in part as follows:

> "Section 3300, 3301 and 3302 of this chapter shall not apply to any of the following employments: First: Employments by the state, county, municipal corporation, township, school or road, drainage, swamp and levy districts, or school board, board of education, regents, curators, managers, or control commission, board or any other political subdivisions, corporation, or quasi-corporation thereof."

Section 3304, R. S. Mo. 1929, construes the word "employer" as used in this chapter "Workmen 's Compensation".

Section 3304, R. S. Mo. 1929, reads in part as follows:

> "The word 'employer' as used in this chapter shall be construed to mean:
>
> "(a) * * *
>
> "(b) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control

> commission, board or any other political subdivision, corporation, or quasi-corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance."

As said in State ex rel. Cobb v. Thompson, 319 Mo. l. c. 496;

> "The rule is well stated, as follows:
>
> "'A statute is not to be read as if open to construction as a matter of course. It is only in case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'".

Therefore, from the foregoing and in the absence of any statutory constitutional provision to the contrary, it is the opinion of this department that a municipality is expressly excluded from the provisions of the Workmen's Compensation Act, unless as provided in Section 3304, supra, they so elect to accept same by law or ordinance.

Your second question is as follows:

> "We have been paying for the burial of our paupers, but recently we have been informed that the County should pay this expense out of the taxes collected from the City of Hannibal for that purpose."

Section 12955, R. S. Mo. 1929, provides:

> "The county court of the proper county shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county without means to pay such funeral expenses."

It is, therefore, the opinion of this department that the above statute controls and that the county is liable for the payment of the burial of its paupers.

CONCLUSION

(1) That a municipality does not come under the provisions of the Workmen's Compensation Act as provided in Chapter 28, R. S. Mo. 1929, in the absence of any statutory or constitutional provision to the contrary, unless they so elect to accept the same by law or ordinance.

(2) That the county is liable for the payment of the burial of its paupers.

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

ARH:HR

CHIROPRACTIC: Board must hold annual election of officers.

2-10

February 8, 1936.

FILED
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Dr. Jerome F. Fontana, Secretary,
State Board of Chiropractic Examiners,
2605 Chippewa Street,
St. Louis, Missouri.

Dear Sir:

We are in receipt of your letter of January 17 requesting an opinion on the following matter:

> "Dr. Trotter, a member of the Missouri State Board of Chiropractic Examiners, and I, Secretary of the Board, have been reappointed by the Honorable Governor, Guy B. Park, on the tenth day of this month.
>
> "We would appreciate knowing if it is necessary for this Board to hold a meeting for the election of officers at this time, or if this business may wait until the Board convenes on May 2, 1936, which date had been set at our last Board Meeting for this purpose. Our last election of officers was held in May, 1935."

Section 13547, R. S. Mo. 1929, creates a state board of chiropractic examiners and provides in part as follows:

> "Within thirty days after the passage of this law, the governor shall appoint five persons as aforesaid who shall be chiropractic practitioners * * *. They shall constitute the first board of chiropractic examiners, their term of office shall expire, one in one

> year, two in two years, and two in three years, after the date of appointment. At the expiration of the term of office of any member of said board the governor shall appoint a member for a term of three years."

We assume from your letter that the term of Dr. Trotter and yourself as members of the Board had expired and that you were reappointed by the Governor by virtue of the above section.

Section 13548, R. S. Mo. 1929, provides for the organization of the Board and states in part as follows:

> "The board shall meet and organize by electing a president, secretary and treasurer, each to serve for a period of one year."

If you had not been reappointed as a member of the Board, a vacancy in the office of secretary would have existed and it may have been necessary to hold an election to fill your office, but since you were reappointed, no vacancy exists in the office, and hence we are of the opinion that it would not be necessary for the Board to hold a meeting for election of officers at this time, but may wait until May, 1936, at which time the officers will have served the statutory term of one year for which they were elected.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

MW:HR

SCHOOLS: CONSOLIDATED DISTRICT may not divide itself to form two new districts; however, consolidated district may change its boundaries so that part of its territory would be annexed to another district.

February 13, 1936.

2-15

FILED
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Honorable Elbert L. Ford
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"I have been requested by T. J. Douglass, Superintendent of Schools of this County, to get an opinion from your office relative to the division of a consolidated school district.

"There are about nine thousand acres of land in the Southeast corner of Dunklin County with a valuation of $142,850.00, that is in the Deering District No. 6 - C at Deering in Pemiscot County, Missouri.

"The pupils enumerated in Dunklin County in May 1935, was one hundred and ninety-eight. The school tax rate of this district is $2.00 per hundred.

"The citizens living in this County which forms a part of this school district are desirous of organizing a school district of their own in order that they may establish a school as there are no schools in Dunklin County to serve the pupils residing therein.

> "Please advise me at your earliest convenience what procedure the inhabitants of this district would have to take in order to divide this district and establish one of their own. According to Section 9343 R. S. 1929, it appears the law makes no provision for dividing a city or consolidated district into two or more districts."

Section 9343, R. S. Mo. 1929, reads as follows:

> "All the provisions of section 9275, relating to the changes of boundary lines of common school districts, and all the provisions of sections 9278 and 9279, relating to the division of property between common school districts, shall apply to town, city and consolidated districts."

We agree to the statement made in your letter as follows: "According to Section 9343, R. S. 1929, it appears the law makes no provision for dividing a city or consolidated district into two or more districts," in view of the two cases decided by the Supreme Court of Missouri, en banc, namely, State ex inf. v. Sweaney, 270 Mo. 685, and State ex rel. Buckley v. Thompson, 19 S. W. (2d) 714.

In State ex inf. v. Sweaney, supra, the court, after quoting Section 9343, supra, said the following (page 691):

> "Plaintiffs in error contend that the above section authorizes the division of a town, city or consolidated school district into two new school districts, while defendants in error contend that it merely provides for changing the boundary lines of such school district, but does not provide for dividing the same into two new districts. After careful consideration of the statute,

> we have reached the conclusion that the above section does not provide a way for dividing a town, city or consolidated school district into two new districts. If Section 10881, supra, had provided that all the provisions of section 10837, Revised Statutes 1909, should apply to town, city and consolidated districts, then there could be no question but that provision had been made for so dividing such districts, because Section 10837, supra, expressly provides for dividing one common school district into two new districts. But instead of the Legislature saying that all the provisions of section 10837 should apply to town districts, it merely said that 'all the provisions of section 10837 relating to the changes of boundary lines of common school districts' should apply. Referring then to Section 10837 we find that the only express provision therein for changing boundary lines is the provision for changing 'the boundary lines of two or more districts.' Other express provision is made for dividing one district into two new districts. It, we think, becomes at once apparent, that the provision for changing the boundary lines of two or more districts could not, by any process of construction, be held to provide a way for dividing one district into two new districts."

In State ex rel. Buckley v. Thompson, supra, the court (pages 718-719), said the following:

> "Respondent says that this proceeding was without authority and void. If there is any legal authority therefor, it must be found in sections 11201 and 11253, R. S. 1919. Section 11201, applying only to common schools, provides what shall be done 'when it is deemed

> necessary to form a new district, to be composed of two or more entire districts, or parts of two or more districts, to divide one district to form two new districts from the territory therein, to divide one district and attach the territory thereof to adjoining districts, or to change the boundary lines of two or more districts.' Section 11253 reads: 'All the provisions of section 11201, relating to the changes of boundary lines of common school districts, * * * shall apply to town, city and consolidated districts.' In State ex inf. v. Sweaney, 270 Mo. 685, 691, 195 S. W. 714, this court in banc held that section 10881, R. S. 1909, now section 11253, supra, only made applicable to town, city and school districts the provision of section 10837, R. S. 1909, now section 11201, supra, relating to changing 'the boundary lines of two or more districts,' and provided no way of dividing a town, city, or consolidated district into two or more districts. By the same course of reasoning, even if it be said that in the instant case there was a change of the boundaries of the one district rather than a division of it into two districts, it follows that the provision sought to be made applicable by this reference statute is here unavailing because such provision relates only to change of boundary lines of two or more districts."

Sections 11201 and 11253, R. S. Mo. 1919, were carried forth in the 1929 revision and are now found as Sections 9275 and 9343, respectively.

You will note that the Supreme Court in the above two cases specifically held that a consolidated district could not divide itself so as to make two districts. However, Division No. 1 of the Supreme Court of Missouri, in State ex rel. Consolidated School Dist. No. 1, Pike County v. Thurman et al., 274 S. W. 800, held that a change in boundaries between two

districts, one of which was a consolidated district and the other a common school district, was permissible, and same being accomplished by virtue of the provisions of Section 9275, R. S. Mo. 1929.

The facts in your case show that a consolidated school district only desires to divide itself, which, in our opinion, it cannot do. However, if a change of boundary was sought between two districts, then it would be permissible.

The court in State ex inf. v. Sweaney, supra, made this further observation as to how a consolidated district could be divided - and that was by disorganizing same. Note the language of the court, at page 692, on that subject:

> "Of course, if a town, city or consolidated district should by a two-thirds vote disorgani,e the territory thereof could, under the provisions of Section 10870 be organized into a common school district and this common school district in turn, under the provisions of Section 10837, be divided into two new districts. Plaintiffs in error, however, did not undertake to proceed by that route, but have undertaken to accomplish the same result by the decision of a board of arbitration acting by appointment of the county superintendentof public schools, as provided by Section 10837, supra. We are of the opinion that the provisions of Section 10837, under which plaintiffs in error acted, have no application to town, city or consolidated school districts."

From the above it is our opinion that a consolidated school district cannot divide itself in order to establish two districts out of the one. However, bear in mind that we are not holding that a consolidated district could not change its

boundary so that part of said district could be annexed to another district as was done in State ex rel. v. Thurman, 274 S. W. 800.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

SCHOOLS:)
COUNTY SUPERINTENDENT OF SCHOOLS:)

County Superintendent of Schools is entitled to only actual expenditures for traveling expenses and clerical hire and when the bill is presented to the county court the county court must draw a warrant for same just so long as the maximum amount allowed has not been exceeded.

October 13, 1936.

10-14

FILED
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Hon. Omer Foley
County Superintendent
Howard County Public Schools
Fayette, Missouri

Dear Mr. Foley:

This is to acknowledge your letter dated October 10, 1936, as follows:

"In re. Section 9467 R. S. Mo., 1929:

"If a county superintendent of schools had one hundred teachers in his county under his supervision he would be entitled to $300 annually, under the above section, for clerical hire and travelling expenses.

"In your opinion, do you think it would make any difference whether it was paid as the expenses occured each month according to miles travelled and help employed, which might mean $15.00 some months, $25.00 another and $30.00 still another, or do you think it could be paid in twelve monthly payments of $25.00 each?

"I had one fellow to tell me that if my monthly average was $25.00, and I had an expense for one month for $20.00, the $5.00 difference could not be made up and I could never put in my bill for over $25.00. I think he is wrong. Please let me know."

Section 9467, R. S. Mo. 1929, referred to in your letter, reads as follows:

> "That the county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent. of his annual salary for traveling expenses and necessary clerical assistance, provided such allowance shall not exceed three dollars ($3.00) annually for every teacher under his jurisdiction. The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire, draw a warrant upon the county treasury for the payment of same: Provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled."

You will note that Section 9467, supra, is divisible into three distinct parts: (1) The amount of allowance the superintendent of schools is permitted for traveling expenses and necessary clerical assistance; (2) the authorizing of the county court to pay for actual expenditures for traveling and clerical hire of the superintendent of schools and the drawing of a warrant on the county treasury; (3) the allowance of four cents per mile to the superintendent when he furnishes his own conveyance.

Your question pertains to the second classification. The second classification reads as follows:

> "The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire, draw a warrant upon the county treasurer for the payment of same."

The above provision is unambiguous and is couched in words which should be given their usual and ordinary meaning. The county superintendent does not receive expenses for traveling or clerical help unless he travels or has clerical assistance. In other words, the county superintendent has no vested right to receive compensation for traveling or clerical assistance unless the superintendent travels or hires clerical help. The Legislature placed a maximum amount that the superintendent could receive. In the illustration you give the maximum amount the county superintendent could receive is $300.00 annually. If the county superintendent did not use the $300.00 for traveling or clerical assistance he would not be entitled to it. The superintendent, if he only used $200.00 of the $300.00, would only be entitled to the $200.00.

Section 9467 does not state when the county superintendent shall present his bill, namely, whether daily, weekly, monthly, semi-annually or annually. But when the superintendent presents his bill it must be for actual expenditures for traveling expenses and clerical hire. Therefore the county superintendent could wait till the end of the year and present his bill in one sum, or if the county court desires a monthly bill presented, then he could present it monthly. But the bill presented must be for actual expenditures. Thus, if in one month the county superintendent had $25.00 for traveling expenses and clerical hire, that would be presented; the next month it might be $50.00 and the next month $10.00, and some months no dollars. However, the bill presented must be for actual expenditures.

It is our opinion, from the above and foregoing, that the county superintendent of schools is entitled to only actual expenditures for traveling expenses and clerical hire, and when the bill is presented to the county court the county court must draw a warrant for same just so long as the maximum amount allowed has not been exceeded.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. Taylor,
(Acting) Attorney-General.

JLH:EG

INHERITANCE TAXATION: Proper method to be employed in assessing inheritance tax against legacy to husband and wife.

2-19

February 18, 1936.

FILED
31

Hon. G. H. Fry,
Judge of Probate Court,
Vernon County,
Nevada, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following:

> "I am writing you for an opinion as to whether there is an inheritance tax due the state in this estate of W.M. Thompson, deceased.
>
> "The inventory shows $2,011.60 of personal property and real estate of $15,300.00, or a total of $17,311.60 in the estate.
>
> "I am enclosing you a copy of the will so you may see the interest of each beneficiary under the will. It is in regard to the bequests to the married daughters and their husbands."

Section 3 of the Will of W.M. Thompson, deceased provides:

> "All the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to Geraldine Isabelle Penny and her husband, Fred Edwin Penny, a daughter and son-in-law, Emma Margaret Mullies and her husband, Charles Otis Mullies, a daughter and son-in-law, William M. Thompson, Jr.,

a son, and Gertrude Willene Thompson, a daughter, to have and to hold the same to them, share and share alike, except the said two married daughters and their said husbands shall be regarded as taking but the one share each between them, absolutely and forever."

This department, in an opinion rendered to the Honorable Thomas A. Walker on November 8, 1934, has ruled that where property is left to a husband and wife, both are necessary in order to make one legatee; in other words, when property is left to a man and his wife, they take as tenants by entirety and become in contemplation of law one person with a dual body and consciousness and therefore of necessity the inheritance tax must be assessed against this entity by a consideration of the exemptions and rates of tax applicable to both parties necessary to make up the entity.

In the case now before us, the total value of the estate is $17,311.60, which said amount must be, according to Section 3 of the will, divided into four equal shares, or $4,327.90 per share. In the case of the two shares passing to the two daughters and their husbands, the exemptions of both husband and wife must be added together and the balance taxed at 2%, this being the mean rate between the rate of tax assessable against the husband and the rate of tax assessable against the wife. Since the share passing to each daughter and her husband is but $4,327.90 and the combined exemptions of each amount to $5500, there could be no tax assessable by reason of these transfers.

Likewise, in the case of the property passing to the unmarried daughter and the unmarried son, the exemption of $5,000 which each is allowed by law is greater than the value of the property passing to them and therefore, there can be no tax on these transfers.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

PUBLIC OFFICERS: Sec. 18, Art. IX, Constitution of Mo. does not apply to City of Brunswick or to Chariton County.

5-12

May 1, 1936.

FILED
31

Mr. A.L. Friesz,
Attorney at Law,
Brunswick, Missouri.

Dear Sir:

This department is in receipt of your letter of April 23 requesting an opinion as to the following state of facts:

> "Will appreciate very much your legal construction on Sec. 18, Art. IX of the Constitution of Missouri, as to whether one person can at the same time fill two municipal offices, that of City Clerk and City Attorney in a third class city."

Section 18, Article IX of the Constitution of Missouri provides:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

In the case of Nickelson v. City of Hardin, 282 Mo. l.c. 203, the Supreme Court of this state construed this section of our Constitution as follows:

> "The question is not free from difficulty, but we are of opinion that the proper construction of the section is that it applies only in counties and cities having more than two hundred thousand inhabitants. This disposes of the only question presented by the briefs. The judgment is reversed and the cause remanded."

CONCLUSION

The City of Brunswick has a population of substantially 1715 inhabitants; the population of Chariton County is substantially 19,588. In view of the case of Nickelson v. City of Hardin, supra, Section 18 of Article IX of the Constitution of Missouri does not, in our opinion, apply to the City of Brunswick or to Chariton County.

In rendering this opinion we have merely given our construction of Section 18, Article IX as it applies to the City of Brunswick and Chariton County, and do not pass upon the propriety of a city clerk being also city attorney.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

JUSTICES OF THE PEACE: Terms of office of appointees, under Section 2136-a, Laws of Missouri, 1935.

June 15, 1936.

6-27

FILED
31

Honorable Edwin D. Franey
Attorney at Law
Mississippi Valley Trust Building
506 Olive Street
St. Louis, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 26, 1936, which reads as follows:

> "I am writing you in connection with Section 2135-A, Revised Statutes of the State of Missouri, which has to do with the terms of office of Justices of the Peace appointed by the St. Louis County Court. One of the Justices of the Peace has asked that I ascertain whether or not the statute as interpretated by you would provide that those Justices appointed in the year of 1935 would hold their offices until the year of 1938. There has been some question in the mind of the sitting Justices on this question and I would be glad to have you advise me so that I may in turn advise them as to just what their situation is in view of the express provision of the statutes. You will recall that the St. Louis County Court created several townships in St. Louis County and appointed Justices to the several offices, and it is in connection with these gentlemen that I write you."

Laws of Missouri, 1935, p. 210, Sec. 2136-a, provide as follows:

"In all municipal townships which have been divided, or may hereafter be divided, into justice of the peace districts and in which the boundary of the municipal township is or may be extended beyond the boundaries of said justice of the peace districts, the county court of the county in which said township is or may be located is authorized and empowered to appoint and commission not to exceed two additional justices of the peace for such township when, in the opinion of said county court, there is need for such justices of the peace, who may maintain their offices at any convention place in said township and who shall take the same oath and have the same duties, qualification and jurisdiction as other justices of the peade of such township. The justices of the peace first appointed under this section of the statute shall hold office till the general election day in 1938, and all other justices of the peace thereafter appointed hereunder shall hold office for a term of four years: Provided that said office shall terminate at any time the aforesaid justice of the peace districts are extended so as to include all of the territory of such township. * * *All acts or parts of acts in conflict herewith, to the extent of such conflict, are hereby repealed."

Article XIV, Section 5, Missouri Constitution provides:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

CONCLUSION.

Under our Constitution there will be a general election on the first Tuesday after the first Monday in November, 1938. Section 2136-a, supra, does not provide for the election of Justices of the Peace, but rather provides the power in the County Court of certain counties to appoint Justices of the Peace, in addition to those and in possible exclusion of those now holding office. Said Section also provides the duration of said appointee's office.

Under our Constitution and Section 2136-a supra, pursuant thereto, additional Justices of the Peace in St. Louis County who are appointed prior to the general election in 1938, hold the office continuously until the general election day in November 1938, and pursuant to the Constitution may continue in office thereafter until a successor be appointed and qualified, unless the office be sooner vacated by death, misconduct or resignation.

Under our Constitution and Section 2136-a, pursuant thereto, the County Court in St. Louis County is empowered to appoint other Justices of the Peace in lieu of those who were thereby appointed for the term prior to the general election of 1938, and when such is done the person appointed and qualified is the legal holder of the office, and holds the office for a four year term, and pursuant to the Constitution may continue in officethereafter until a successor be appointed and qualified, unless the office be sooner vacated by death, misconduct or resignation.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

ROY McKITTRICK,
Attorney General.

WOS:H

SCHOOLS: CONSOLIDATED SCHOOL DISTRICTS: Election to dissolve consolidated district under Sect. 9331, must be held at the consolidated school building and the notice of election to dissolve must be given by the Board of Directors.

July 20, 1936

7-24

FILED
31

Honorable Ted Frossard
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This Department is in receipt of your letter of July 6, wherein you request an opinion as to the legality of an election to dissolve Purdy School District, Consolidated District No. 8. Your letter is as follows:

> "I am writing to you in regard to the above School District. In the year 1928, Purdy, Missouri, a municipal corporation, of some 400 hundred people, had and maintained a high school of the first class, offering 4 years of high school work, in addition to the eight grades.
>
> "Several common school, rural, districts adjoined Purdy District and it became desirous to Consolidate Purdy District and 9 rural school districts, thus making one Consolidated District.
>
> "In 1928 an election was held for the purpose of Consolidating and the Consolidation of the 10 districts was perfected. Thereafter the Consolidated School District was known and styled as Purdy Consolidated School District No. 8, Barry County, Missouri. It was run and operated as a Consolidated School District thereafter, a High School being maintained in the Town

of Purdy, at the old High School building, with grade schools being maintained at the school houses in each of the rural districts, as they were before consolidation.

"In the annual school election held in said District in the year 1936, the voters assembled, voted that thereafter all general and special elections held in said School District should be held at the High School Building in said District. The High School Building is nearly centrally located within the District.

"Some months after the annual School election of 1936, a notice signed by 10 resident taxpayers of said School District, voters, was presented asking for an election to disorganize said School District. The election was called, but not by an order of the School Board, the notices were signed by the 10 resident taxpayers and voters, and the election was called to be held at a school house in one of the outlying sections of the Consolidated District. The place where the election was attempted to be held was some 5 miles from the High School Building. The Section of law governing disorganization of such Districts is Sec.9331, R. S. 1929.

"You will note that in Sec. 9331, the election is to be held at the school house in said district.

"There are several hundred voters in said School District. Only 150 votes were cast at the election to disorganize. There were 150 votes for disorganization.

"The question is, Was a special election for the purposes of disorganizing said School District, held at a school house in an outlying part of the Consolidated

District a legal election? It is to be kept in mind that there are 10 school houses in the Consolidated District. The central High School Building located in Purdy, then a school house in each of the old 9 common school districts, and that school was held in each of these buildings by the Consolidated District.

"It is the contention of those who desire to disorganize the District that an election for that purpose could be held at any of the school houses within the District, since the law says that such election shall be held at the school house.

"It is the contention of those who do not want the District disorganized, that the words the school house as used in Sec 9331 of the Statutes 1929, refers to and means the central school house, in this case the High School Building.

"Section 9331, Statutes 1929, does not provide who shall post the notices calling such special election. The notices calling the special election in this case were not posted by the District Clerk. They were posted by some of those who wanted the District disorganized. Neither was any petition to call such election presented to the Board of Directors, nor did the Board of Directors call or order the special election to disorganize the District.

"Section 9310, R. S. 1929, provides that the District Clerk shall post all notices required by law, when duly ordered by the Board for any annual or special school meeting, etc. This section applies to common School Districts, but may also be applicable to Consolidated Districts

> wherein it is sought to disorganize same.
>
> "The facts are that it is causing some anxiety and disturbance . Those who think the District is disorganized have met, re-organized their old common school districts, elected a Board of Directors for same voted a levy and have presented same to the County Clerk, demanding that their revenue for the coming school year be set out to them. The Board of Directors of the Consolidated District are still functioning and intend to carry on the school as a Consolidated District.
>
> "Will you please give me your opinion as to whether the election held to disorganize the Consolidated District was legal."

In determining the legality or illegality of an election and the dissolution it will be well to bear in mind the terms of the section under which the election for the dissolution was held.

Section 9331, Revised Statutes Missouri 1929, was amended by the General Assembly of 1931, so that said section now reads as follows: (Laws of Missouri 1931, page 351)

> "Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice,which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district;and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school

> district at the school house in said school district and at said meeting, if two-thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under article 3 of this chapter."

The material change made by the Legislature was by inserting the words 'present and voting,' whereas, the old section of 1929 contains the clause "if two-thirds of the resident voters and taxpayers of such school district shall vote to dissolve any such town, city or consolidated school district, etc." The Supreme Court has held that under the old law it is necessary for two-thirds of the taxpayers to vote to make the proposition carry, whereas, now, it is only necessary that two-thirds of the resident voters and taxpayers of said school district present and voting. Therefore, if the election was regular in every other respect and of the number of votes, 156, to-wit, 150 would constitute a valid number of taxpayers present and voting at such election.

This District has been in existence since 1928, but we assume the taxpayers and voters of the district have become divided in the sentiment and attitude towards the district, some desiring dissolution others desiring to retain the present district. Such conditions often arise in school matters and roads, which is to be regretted, but, as in the instant case, too often cannot be avoided. Coming closer to the main question in your letter, to-wit: Whether the recent election wherein a notice signed by ten resident taxpayers of the district was presented, asking for an election asking to disorganize the district, was legal and valid?

We note in your letter that a notice signed by ten resident taxpayers of the school district was presented asking for an election to disorganize the school district. The election was called but not by order of the school board.

You do not state who called the election but we shall discuss whose duty it is to call the election. Section 9333, Revised Statutes Missouri 1929, names the duties, restrictions and liabilities of boards of city, town and consolidated schools. The pertinent part is as follows:

> "The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state: * * * * * * * * * * * * *"

Likewise, Section 9327, Revised Statutes Missouri 1929, refers to the government and control of an ordinary school district, as follows:

> "The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified, and any vacancy occurring in said board shall be filed in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled, and the person appointed shall hold office until the next annual meeting, when a director shall be elected for the unexpired term."

Section 9328, Revised Statutes Missouri 1929, refers to the election of directors of consolidated schools.

Section 9329, Revised Statutes Missouri 1929, amended by the Legislature of 1931, Laws of Missouri 1931, page 333, refers to the organization of the board and duties of the officers. Bearing in mind Section 9333, which contains the sentence "The board of education of any town, city or consoli-

dated school district shall, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts," whose duty is it to order the election in pursuance to the notice of the ten taxpaying petitioners?

Section 9310, Revised Statutes Missouri 1929, refers to notices and is as follows:

> "It shall be the duty of the district clerk to post all notices required by law, when duly ordered by the board, for any annual or special school meeting; also, those required by law to be posted by the district clerk without such order of the board; and all such notices shall be given as provided in section 9283."

Section 9283, Revised Statutes Missouri 1929, refers to the annual meeting of the district and is as follows:

> "The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p. m. If no schoolhouse is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

The above section has been upheld in the case of State ex rel. v. Consolidated School District 238 S. W. 819.

This section also refers to the annual meetings of a consolidated school district.

In the case of State ex inf. Barrett v. Clements 305 Mo. 1. c. 314, Judge Woodson, in a dissenting opinion, in discussing the election held for the dissolution of a district, states the facts to be as follows:

> "The evidence shows that the meeting convened at the shhool house in the consolidated district about two o'clock in the afternoon of said date; that it was called to order by the president of the board of education of the district,from a platform in front of the building; that more people were present than could get into the school house; that the meeting was organized by the election of G. L. Story as chairman, and A.O. Billings as secretary; that relators herein, and others opposed to the dissolution of the district, were present at the meeting in large numbers; and that they attempted to elect a chairman, were outvoted, and refused to take any further part in the meeting, but, for the most part, remained on the grounds until its close."

Thus it will be noted that it is the duty of the board of education of a consolidated district to call an election for the dissolution of the district; the business affairs of the school district are lodged in the board of education. The statutes confer such powers on the board or education or directors. Therefore, the calling of all elections and the statutory procedure as set forth in Section 9331 must be done by the board. If we concede for a moment that it is not necessary for the board or the secretary to give notice of such elections, then, any ten taxpayers in any part of the district at any time could hold a meeting at any school house in the district by putting up five notices

in five public places in any one school district. We think, clearly, the statute refers and has in mind that a board of education of a consolidated or main school district, where the central building is located and the affairs and business of the consolidated district are held or transacted, should call the election and the notices be prepared and put in five public places throughout the consolidated school district. We are further persuaded to this conclusion that a part of Section 9341, Revised Statutes 1929, now Section 9341, Laws of Missouri 1933, page 381, in referring to the annual school election of consolidated schools says,

> "At such convenient place within the district as the board may designate."

You state that the election was held at one of the outlying rural school district school houses, and the contention is made that the statute is complied with when the election is held, "at the school house in said school district."

The title of Section 9331 is, "town, city or consolidated school district, how disorganized."

In the instance of a town or city there is usually one building, while in a consolidated district there are one main centrally located building and numerous other rural grade schools in the district, as is the case in the Purdy School District. If a dissolution election were held for the purpose of dissolving a town or city school district, assuming that the notice was regular, then, of course, "at the school house in said district" could only refer to the school building in the said town or city, but in the case of a consolidated school district there are, as stated before, one main building or buildings and numerous rural school houses. We think, clearly, that the phrase "at the school house in said school district" in the case of a consolidated school district, could only refer to the central and main consolidated school district building located in said district and organized under Section 9345, Revised Statutes Missouri 1929, which likewise provides that such organization and the government of such consolidated district shall be under and in compliance with the laws governing town and city school districts, as provided in Article IV of this Chapter and Sections 9351,

9352 and 9353, Revised Statutes Missouri 1929.

CONCLUSION

We are of the opinion that the election held in the Purdy School District is void, invalid and illegal for the reason that the notice, under the facts as stated in your letter, could not constitute legal notice, and, second, that the place of the voting was not the legal place as contemplated by the statute; that the election held did not give the voters and taxpayers of the district free opportunity in the entire district to express their sentiments either for or against dissolution; that by the notice and the place of the election the voters of the district were deceived and prevented from expressing their wishes in regard to the matter by inconvenience in place of voting and by failure of notice. The voters and taxpayers in the other districts, other than the one in which the attempted election was held, could have only been notified or could have known that such a purported or attempted election was being held by rumor or hearsay. In the last analysis, the real test of the validity of any election in addition to statutory requirement is, does every voter have an opportunity to express his preference for or against any proposition. For the reasons heretofore assigned we hold that such an election in invalid and illegal.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:LC

COOPERATIVE ASSOCIATION: -- Re: Federal Loans to Cooperatives; Exemptions from certain taxes; Sections 12676 et seq; Sections 12706 et seq; Sections 12748 et seq, R. S. 1929.

June 25, 1936.

1-14

FILED 32

Mr. George Gayou
Executive Vice-President
Missouri Retailers Association
511 Locust Street
St. Louis, Missouri

Dear Mr. Gayou:

This is to acknowledge receipt of your letter of recent date relative to cooperatives, consumer cooperatives, particularly those which have a background of government assistance and are exempt from taxes. Also, you inquire as to whether there are any statutes providing for loans to any of these groups at a low rate of interest in Missouri.

We find that laws have been enacted pertaining to several different kinds of cooperative associations. Article 24, Chapter 87, R. S. Mo. 1929, Sections 12676 to 12705, inclusive, pertain to what has been termed "non-profit cooperative associations," which associations have powers, among others, to engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or the marketing of the by-products thereof; or any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment or in the financing of such activities; or in any one or more of the activities specified in this section, and certain other powers given to the ordinary corporation.

Under Section 12704 of the above article we find that "each association organized hereunder shall pay an annual fee of ten ($10) dollars only, in lieu of all franchise or license or corporation or other taxes, or taxes or charges upon reserves held by it for members."

In Article 25, Chapter 87, R. S. Mo. 1929, Sections 12706 to 12724, inclusive, we have what has been termed "commodity associations." Under the provisions of Section 12719 of this Article, we find that "commodity associations," as herein authorized may be incorporated as follows:

> "Corn growers associations, wheat growers associations, potato growers associations, apple growers associations, strawberry growers associations, cotton growers associations and melon growers associations, but no such association shall be formed for the purpose of growing or producing and marketing more than one of such commodities, and associations of growers; or producers of any other commodity or product of the soil though not herein named may be incorporated under the provisions of this article. Every such association shall have, as a part of its corporate name, the name of the commodity in the growing, production and marketing of which its members are, or proposed to be engaged."

We find that under Section 12723, of the same article and chapter, that "commodity associations" organized under the provisions of this article shall be exempt from the limitations, restrictions and burdens imposed upon corporations by any law of the state pertaining to the regulations thereof, except as are in this article specifically set forth.

And under Article 29, Chapter 87, R. S. Mo. 1929, Sections 12748 to 12766, inclusive, for the association of not less than twelve persons as a cooperative association, society or exchange having all the incidents, powers and privileges of corporations, for the purpose of conducting any agricultural or mercantile business on the cooperative plan, including the buying, selling, manufacturing, storage, transportation or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of the purchasing of or selling to all shareholders and others, groceries, provisions and all other articles of merchandise.

e find that there has been recently enacted by Congress and created what has been called the Farm Credit Administration, and found at Sections 1141b, 1141c, 1141d, 1141e and 1141f in U. S. C. A., 1935 Cumulative Annual Pocket Part, Title 12, Banks and Banking, page 265, and the administration is authorized and directed --

> "(1) to promote education in the principles and practices of cooperative marketing of agricultural commodities and food products thereof.
>
> "(2) to encourage the organization, improvement in methods, and development of effective cooperative associations.
>
> "(3) to keep advised from any available sources and make reports as to crop prices, experiences, prospects, supply and demand, at home and abroad."

Under Section 1141d there is hereby authorized to be appropriated the sum of $500,000,000 which shall be made available by the Congress as soon as practicable after approval of this subchapter and shall constitute a revolving fund to be administered by this administration as provided in this subchapter and subchapter V of this chapter.

And under Section 1141e, upon application by any cooperative association the administration is authorized to make loans to it from the revolving fund to assist in (1) the effective merchandising of agricultural commodities and food products thereof and the financing of its operations; (2) the construction or acquisition by purchase or lease, or refinancing the cost of such construction or acquisition of physical facilities. And further provides certain restrictions as to such loans.

Under Section 1141f (a) loans to any cooperative association shall bear such rates of interest as the governor of the Farm Credit Administration shall from time to time determine to be necessary for the needs of the lending agencies and shall by regulation prescribe (but in no case shall the rate of interest exceed six per centum per annum on the unpaid principal). Under this section it seems to be <u>discretionary</u>

with the governor of the Farm Credit Administration as to what the rate of interest shall be to cooperatives. As to what rate of interest is charged we are not at this time informed.

We have only very briefly reviewed the provisions of our statutes pertaining to the organization of cooperatives in this state and the provisions of the Federal statutes. No doubt those associations organized under Articles 24 and 29 are the ones in which you are more particularly interested. It will be observed that those organized under Article 24 are exempt from all franchise, license, corporation or other taxes, or taxes upon reserves held by it for its members. We do not find that there are any provisions in our statutes for these associations to have a lower rate of interest than individuals or other corporations.

With reference to the Federal Farm Credit Association, which has the power and authority to loan money to cooperatives, we are informed that they have headquarters at 15th and Locust Streets, St. Louis, Missouri, and are engaged in administering this Act in this District. Under separate cover we are forwarding to you a copy of the General Corporation Laws of the State of Missouri, with the sections of the statute pertaining to cooperatives marked for your use, which you will find from pages 140 to 160, inclusive.

If there is anything further or we have not answered the questions asked in your letter, we will gladly go into the matter more in detail for you.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

CRH:EG

SHERIFF:)
JAIL:) Sheriff authorized to purchase supplies for County Jail.

2-19

February 17, 1936

FILED
23

Mr. A. R. Gibson
Sheriff
Putnam County
Unionville, Missouri

Dear Mr. Gibson:

This is to acknowledge receipt of your letter of February 13, 1936, in which you request an opinion from this Department. From your written request, and orally, we understand that you desire our opinion as to whether it is the duty of the Sheriff to purchase supplies for the County Jail in your County or whether the county court may by order assume such responsibility and make the purchases itself.

Sections 8524 and 8526, Revised Statutes of Missouri, 1929, provide respectively as follows:

(8524)
"There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

(8526)
"The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

The latter section gives the sheriff "custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail." Under this section the sheriff has the authority and power, and it is his responsibility, to purchase all the necessary supplies for the county jail.

In an early case on the subject, Harkreader v. Vernon County, 216 Mo. 696, l. c. 708, it is said:

> "It is written in the statutes that jails should be 'kept and maintained in a good and sufficient condition,' etc. (R. S. 1899, sec. 8104), that is, 'good and sufficient' in a modern sanitary sense, having an eye to the sure results established by scientific investigation of the disease-breeding effects of filth and bad air."

In the case of Kansas City Sanitary Co. v. Laclede County, 307 Mo. 10, 269 S. W. 395, l. c. 398, the court said:

> "Under section 12549 the jail is required to be kept in good and sufficient condition and under section 12551 the sheriff of the county has the custody, keeping, and charge of the jail. He therefore has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition, which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. Harkreader v. Vernon County, 216 Mo. 696, 116 S. W. 523."

The opinion in the above case was quoted from approvingly in the case of Hammond & Stevens v. Christian County, 62 S. W. (2d) 844-845.

From the statutes and the above and foregoing cases interpreting same, it is our opinion that the Sheriff has the authority to purchase the necessary supplies for the County Jail and he needs no authorization or order from the County Court so to do.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

OFFICERS - Term of office of municipal officers shall date from the election, and their salaries cannot be increased during the term for which they were elected.
CITIES

April 23, 1936.

577

FILED
33

Honorable A. Glenwood Gilliland
Attorney at Law
Cameron, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"We have a situation arising in our City affairs upon which we need a legal opinion. Certain of the City officials are not satisfied with local opinions from members of the bar. May I relate the facts and cite statutes concerned?

"Our City election was held on April 7, 1936, at which time the usual city officers were elected as becoming to a Third Class City. About midnight of the night before, the City Council was in regular session. They passed a new and proper ordinance which set the Mayor's yearly compensation at $300.00., the City Attorney's compensation at $200.00 and fees, etc. In the past several years, the City Attorney has received $300.00 per year. Thus, the sum of $100.00 was deducted from the City Attorney's compensation.

"It is our custom for the old Council to meet again before the new council takes office. At this last meeting of the old council, and before the new Mayor, new City Attorney, and new council members had been sworn in, an ordinance was presented putting the City Attorney's compensation back to the regular $300.00. The Mayor brought up the idea that since the new City Attorney was elected, although not yet qualified by being sworn into office, his salary could not be raised.

"Under Article 14, Section 8 of the Missouri Constitution, the compensation of a municipal officer cannot be increased during his term of office. Then, the whole question boils down to this: When does a newly elected officer's term begin? From the date of his election, or from the date upon which he qualifies? If upon the latter, could our City Attorney's salary be changed any time up to the time when he is sworn into office. The Statutes, Section 6723, provide that the officers shall be elected for two years, and until their successors are duly elected and qualified.

"The new council has now taken office, but the City Attorney has refused to be sworn in until they ascertain whether or not the council can raise his salary to the former amount of $300.00 per year. The Mayor and Council are willing to do it, if it can legally be done. The old City Attorney is therefore holding over, until his successor qualifies.

"Under these facts, will your office be so kind as to render an opinion as to what the City Council can do in this case. Can they pass an ordinance leaving all other salaries at the sum they are now fixed on, and include in there a provision setting the City Attorney's salary at $300.00, in place of the now provided sum of $200.00? Please bear in mind, that the newly elected City Attorney has not yet taken the oath of office or entered upon his duties.

"I realize that your office is likely extremely busy at this time, but I shall appreciate, on behalf of the Mayor and City Council of Cameron, Missouri, your every effort to render an immediate opinion on this question. The next regular meeting of the City Council is to be held on May 4, 1936. If I can have your opinion before that date, I shall certainly appreciate it.

"I have taken the position that a person elected to an office is not an officer until he is sworn into office, and that his salary can be increased

> any time before he takes his oath. Others have contended that his term of office begins from the time he is elected, and that after that date (April 7th in this case) his salary cannot be increased."

Section 6721, of R. S. Mo. 1929, relating to election of municipal officers of a city of the third class, provides:

> "A general election for the elective officers of each city of the third class shall be held on the first Tuesday in April * * and every two years thereafter. * * "

And further in part:

> "* * Any city organizing under the provisions of this article may elect a mayor and such other officers as may be necessary to carry this article into effect, who shall hold office until the second Tuesday in April thereafter, and until their successors are elected and qualified."

Section 6723 of R. S. Mo. 1929, relating to the terms of office for elective officers of a city of the third class, provides as follows:

> "The following officers shall be elected by the qualified voters of the city, and shall hold their offices for two years, and until their successors are duly elected and qualified, to-wit: A Mayor, marshal, attorney, police judge, assessor, collector and treasurer. The attorney shall be a person learned in the law."

You will note that the above section of the statute does not specifically set forth the term of office, i.e., the time that the term shall commence or end, except to say that

the officers shall hold their offices for two years, and until their successors are duly elected and qualified. Inasmuch as Section 6721, supra, provides that the election of officers of each city of the third class are to be held on the first Tuesday in April and every two years thereafter, we construe this to mean that the statutory period of the term commences from the date of the election. In this connection, we find that the general rule is stated in 46 Corpus Juris, at page 966:

> " ** where no time is fixed by the constitution or statute the term begins, in the case of elective offices, on the day of election, ** "

In the case of People, by Fleming, Attorney General ex rel. Quereau vs. Hamrock, 222 Pac. l.c. 392, the Supreme Court of Colorado said:

> "It is obvious that, where an election is necessary, a term will not begin until after an election is held."

In the case of People ex rel. Holdom vs. Sweitzer, 117 N. E., l.c. 628, the Supreme Court of Illinois, in passing upon the question as to when the terms of office of circuit judges in that particular state began and ended, said:

> "The term of office as fixed by law is sometimes used interchangeably with the term or time of occupancy of the incumbent of such office, but it must be distinctly borne in mind, that the term of office as fixed by law is entirely different from the period of time such office is held by the incumbent thereof, sometimes referred to as the term. The general rule seems to be that the term of office, when not fixed as to the date of its beginning and ending by a Constitution or statute, begins in the case of elective offices on the date of election."

A person having been duly elected to a particular office by the people has thus derived his title to the of-

fice from the people, but despite his or her having acquired the title to the office by reason of election, the statute imposes on the person so elected an obligation that such person be qualified. In this respect, under the provisions of Section 6744 of R. S. Mo. 1929, the provision is made that every officer of the city, before entering upon the duties of his office, shall take and subscribe to an oath or affirmation before some court of record in the county or justice of peace in the township or the city clerk or police judge, that he possesses all the qualifications prescribed for his office by law.

In the instant inquiry, the city attorney, under the provisions of Section 6723, supra, shall be a person learned in the law. Under Section 6744, supra, it is further provided that if any person elected or appointed to any office shall fail to take and subscribe to such oath or affirmation, his office shall be deemed vacant.

Article XIV, Section 8 of the Constitution of Missouri provides:

> "The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of Folk vs. St. Louis, 250 Mo., l.c. 134, the Supreme Court, in discussing the object of the above quoted part of the Constitution, said:

> "The object of section 8, article 14, of the Constitution of Missouri, prohibiting an increase of compensation or fees of certain officers during their terms, is apparent. When any popular individual is elected to a public office his influence with the legislative department of the State is likely to be very great; and, consequently, the General Assembly may be easily persuaded that the compensation of the aforesaid popular individual is too small, and, at his suggestion,

> increase his salary or other compensation to an unreasonable extent. This is particularly true where the popular individual is elected to an office which enables him to reward his friends with official patronage or other official favors.
>
> "It was to prevent persons while possessed of the prestige and influence of official power from using that power for their own advantage that the framers of our organic law ordained that salaries of public officers should not be increased during the terms of the persons holding such offices."

It appears from your request for an opinion that the city attorney-elect refuses to assume the office until such time as the present city counsel increases the salary of the office to what it was formerly before the old counsel passed the "midnight ordinance", reducing the city attorney's salary. Since the salary, incident to the office of the city attorney was $200.00 at the time of the election of the municipal officers, the city council would have no right to increase the salary during the legal term, i.e., from April 7, 1936 to April 7, 1938.

The propriety of such an ordinance as passed we have not in the course of this opinion discussed, as we deem it not material for the conclusion reached.

CONCLUSION.

In light of the above, it is our opinion that the term of office of the city attorney begins from the date of election and that the salary incident to the office at the time of election cannot be increased during the legal term.

Further concluding, in the words of the Supreme Court of New Jersey, in the case of Haight vs. Love, 39 N. J. Law Reports, 476, l.c. 479, it is said:

"The beginning of a term of office ought not to be left to the will of the officer himself. If not fixed by law, it must begin as soon as he can, by his own act, enter upon it."

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:FE

BOARD OF HEALTH--BIRTHS: Free birth records, when available, are to be furnished for use in perfecting claims for United States Soldiers' pensions.

July 9, 1936.

7-9

FILED 34

Honorable Herman S. Gove, M. D.
Assistant State Registrar
State Board of Health
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated June 23, 1936, which reads as follows:

> "We are writing you for an opinion on a matter that has confronted this department recently. Veterans who were born prior to 1910 have been writing us either individually or through the various organizations such as Veterans' Administration, American Red Cross, etc. seeking birth certificates of themselves to be used in claims. As you may know, we have no records prior to 1910 but in the 1931 legislature an act was passed enabling this department to record births of persons born in Missouri or now residents of Missouri and who were born prior to 1910. Quoting from Book 11, Revised Statutes of Missouri, 1929:
>
> " 'Section 13884. Free copies of records. Whenever a certified copy or copies of any public record in the state of Missouri are required to perfect the claim of any soldier, sailor or marine, in service or honorably discharged, or any dependent or such soldier, sailor or marine, for a United States pension, or any other claim upon the government of the United States, they shall, upon request be furnished by the custodian of such records without any fee or compensation therefor.'

"We do not have any records prior to 1910 and must record these births from affidavits presented by the applicant. Therefor would this section be applicable to the prior to 1910 birth:

Section 9054a, Laws of 1931, p. 230, provide:

"Whenever, prior to the taking effect of this article, a person was born in the state of Missouri, or a resident of Missouri born outside this state, such birth may be registered in the manner and according to, nearly as possible, the provisions of section 9053 of this article, by filling out blank registration papers secured from the local registrar and filing same, together with a registration fee of $2.50, with the state registrar of vital statistics. Such papers shall contain the affidavits, sworn to before a notary, or at least two persons, knowing the facts. The state registrar may require further affidavits to establish the truth of the facts endeavored to be made of record by the certificate and may withhold filing of such birth certificate until his requirements are complied with. The State registrar may make and enforce appropriate rules and regulations to carry out this act and prevent fraud and deception."

Section 13884 R. S. Mo. 1929, set out in your request should be construed with Section 9054, supra, so that the provisions of both sections have force.

CONCLUSION.

Where the Board of Health has recorded any births, pursuant to the Law of 1931, supra, the said record, like all the Board's other printed records, falls within the

liberal provision of Section 13884, supra. Where you are requested for a birth record to be used in perfecting a claim for a United States Soldier's pension, it is your duty to furnish said record without fee, if you have said record. If you do not have said record you should so state, and at the same time explain that your birth records, prior to 1910, are very imcomplete, as the law, prior to that time, did not require compulsory birth registration, and the privilege of recording births occuring prior to that date is only by the 1931 enactment.

yours very truly

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

TAXATION: Who entitled to surplus received from tax sale.

January 29, 1936.

1-29 FILED 35

Honorable J. W. Guerrant
Collector of Callaway County
Fulton, Missouri

Dear Sir:

Acknowledgment is made of your request for an opinion of this office on the following matter:

> "1. Where land is sold for taxes and redeemed by one of the heirs, who gets the overplus, the one that redeems or the heirs?
>
> 2. Where land is sold for taxes with a mortgage, who gets the overplus, the one who holds the mortgage or the one whose name is in it?
>
> 3. When land is sold for taxes and no one claims the overplus what becomes of it; is the purchaser entitled to it?"

We shall deal with your questions in the order in which they are asked.

I.

OWNER IS ENTITLED TO SURPLUS OF TAX SALE IF PROPERTY IS CLEAR.

Section 9953c, page 433, Laws of Missouri 1933, provides in part as follows:

> "Where such sale is made, the purchaser of such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; * * * * *"

Section 9959, page 428, Laws of Missouri 1933, provides in part as follows:

> "When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found,* * * *"

While Section 9953c does not specifically name the person to whom the surplus shall be paid, it describes such person as"the person entitled thereto", and from the provisions of Section 9959 it is quite apparent that "the person entitled thereto" is, in the usual case, "the owner or owners, agent or agents", referring of course to the agent of the owner. This construction is consistent with the general rule as laid down in 61 Corpus Juris, 1213, Section 1641. Here it is stated:

> "As a general rule the surplus remaining after sale of property and the payment of the taxes, interest and costs, belongs to the owner of the property at the time of the sale, subject to such claims as may be allowed to mortgagees and lienees, and will be paid over to him provided he applies for it within the proper time."

By the general rule and by any rule of justice and fairness the person owning the property at the time of the sale is entitled to any overplus which may be big for the certificate of purchase. This is certainly equitable in view of the fact that it will be the owner who will have to redeem the property from the sale by paying the full amount of the certificate of purchase, which amount will include any surplus or overplus. Thus we see that the question as to who is entitled to the surplus is not to be determined by the fact as to who redeems the property. If several heirs were the owners of the property at the time of the sale the overplus should be paid to them in proportion to their respective interests and the fact that one of them may have redeemed the property has no bearing upon the question as to who is entitled to the overplus. That question is determined by the ownership of the land at the time of the sale.

CONCLUSION.

It is therefore the opinion of this office that in the event clear property is sold for taxes, the owner thereof or the heirs of such owners are entitled to any overplus received from such sale in proportion to their interests.

II.

WHERE MORTGAGED LAND IS SOLD FOR TAXES MORTGAGEE IS ENTITLED TO OVERPLUS.

On the 5th day of April 1935, this office rendered an official opinion to Joseph T. Tate, Prosecuting Attorney of Gasconade County, in which the following conclusion was reached:

> "In conclusion, it is our opinion that where a surplus exists after the sale of real estate for taxes, such surplus should be paid to the owner of the property, if only one person has any interest therein; that if the collector is satisfied that there is a valid recorded unsatisfied mortgage against the property, payment to the extent of the then mortgage debt could be made to the mortgagee and should not be paid to the mortgagor, and that if there is any doubt about the person to whom payment should be made, the safest procedure for the collector would be to turn the money

into the county treasury under R. S. Missouri 1929, Section 9959, as amended by Laws of 1933, page 425, 428, leaving proof of ownership to be made to the county court under that section."

This conclusion is in accord with the general rule hereinbefore referred to. We herewith enclose to you a copy of this opinion for examination, and will not go further into this question as that ruling disposes of your problem.

III.

PURCHASER AT TAX SALE NOT ENTITLED TO OVERPLUS ALTHOUGH LAND UNREDEEMED.

Section 9953c, page 433, Laws of Missouri 1933, in addition to the part thereof heretofore quoted, provides that if the county collector has any doubt as to who is entitled to the surplus or if any dispute arises as to who is entitled to such surplus, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto. However, Section 9959, page 428, Laws of Missouri 1933, appears to specifically answer your question. This section provides:

"When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the state of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or nwnrrs, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and

> sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector making the same shall pay the said surplus money into the county treasury, take the receipt in duplicate of said treasurer for said overplus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

There cannot be any doubt as to the procedure you should follow in case no claim is made by the owner to the surplus which may exist from any tax sale. You should make the report or statement provided for andpay the money to the county treasurer. The money is then placed to the credit of the school fund of the county and if no proper claim is made at the end of twenty years it becomes a part of the permanent school fund. The County Court, of course, has jurisdiction over the fund and can pay the same to the owner upon satisfactory proof being made therefor.

CONCLUSION.

It is therefore the opinion of this office that in the event the owner or the agent thereof does not claim the surplus existing from any given tax sale, the collector should make the statement provided for in Section 9959, page 428, Laws of Missouri 1933, and after such statement has been approved by the County Court, pay such surplus to the county treasurer, taking receipt in duplicate therefor, and that such surplus should then be placed to the credit of the school fund of the county to be held in trust for the benefit of the person entitled thereto for a term of twenty years, after which it becomes a part of the permanent school fund.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

CRIMINAL . ../--MORTGAGED PROPERTY: C. ain evidence admissible in crime of disposing of mortgaged property.

February 3, 1936.

2-3

FILED
35

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

We acknowledge your request for an opinion, dated January 28, 1936, which reads as follows:

> "I have a case coming up the 5th day of February in Howell County, Missouri. It is a case wherein the defendant is charged with selling mortgaged property, and I want to know if there are any authorities holding that the state can introduce evidence of other sales of property under the same mortgage, that is sales other than the one charged. I have evidence of this defendant's selling parts of the property under the same mortgage at different times and I want to know if there is any authority under which I can introduce the sales other than the specific one charged.
>
> "If it is possible I would certainly appreciate an early reply to this request, at least in time that I may know before the date set for trial."

We are assuming that you have charged a man with violating the provisions of section 4100 R. S. Mo. 1929. In the case of State v. Bailey, 190 Mo. 257, l. c. 280, our Supreme Court quoted approvingly from People v. Molineaux, as follows:

> "Generally speaking, evidence as to other crimes is competent to prove the specific crime when it tends to

> establish first, motive; second, intent; third, the absence of mistake or accident; fourth, a common scheme or plan embracing the commission of two or more crimes, so related to each other that proof of one tends to establish the others; fifth, the identity of the person charged with the commission of the crime on trial.' "

In the case of State v. Drummins, 204 S. W. 271, 274 Mo. 632, l. c. 648, this Court said:

> "For the reasons given for this trip tended to prove the intercourse alleged, as well as the promise of marriage, and the efforts made upon the trip to bring about an abortion tended also to prove intercourse and in a way the recognition by defendant of the paternity of the child. Being competent it was properly admitted, and the fact that the circumstances tended to prove the commission of a separate crime was merely defendant's misfortune, and does not in any wise militate against the admissibility of the evidence. For the rule is fairly well-settled that when evidence is admissible for any purpose, in the specific charge upon trial, such evidence will not be excluded merely because it may also tend to prove the commission of another crime."

16 Corpus Juris, p. 596, section 1156, provides:

> "Evidence of other transactions which illustrate the intent and motives of accused in the transaction under investigation is admissible in a prosecution for participating in a sale of mortgaged property with intent to defraud."

CONCLUSION.

We are of the opinion that evidence of other sales, than the one alleged, may be shown in evidence in proof of the intent and motive for the crime charged, if said other sales occured at a time prior to the alleged crime. This crime is one in which specific intent to defraud is essential, and evidence of other frauds growing out of sales of said property under the same mortgage shows a clear connection between the two offenses, and is a circumstance which is properly admitted in evidence to prove intent and motive.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

CRIMINAL LAW--MORTGAGED PROPERTY--VENUE: Where to place the in prosecution for sale of mortgaged property.

May 22, 1936. 5-23

FILED 35

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion dated May 9, 1936, which reads as follows:

> "I have a case pending down here that will come up at the June term of the Circuit Court of Howell County in which I have a man charged with selling mortgaged property, and the facts in the case are that he took the mortgaged property from Oregon County (where the mortgage was given and recorded) to East St. Louis and sold them. The case against him was filed here in Oregon County under Gordon Dorris the former prosecuting attorney of this county, and the defendant took a change of venue from the county and the case was sent to Howell County.
>
> "The point I am in search of is whether or not the venue in the case was properly brought in Oregon County?
>
> "My library is limited and I have exhausted the same in trying to find a case holding the venue to be in Oregon County but I have failed to find any authorities on the point.
>
> "The Court in Howell County will set in the first part of June and I would like to receive a reply from you in time to have the same ready for the court there."

We take it that the offense charged is under the provisions of Section 4100 R. S. Mo. 1929.

In Corpus Juris, Vol. 11, Sec. 384, p. 646, the law is thus stated:

> "In the absence of statutes the place of sale or other disposition of the property has been held to determine the venue irrespective of where the mortgage was executed or where the property was brought from. However, it has been held that if the property is taken to another county with the intention of disposing of it there, and is sold in the latter county, the offense may be prosecuted in either jurisdiction."

A person may be guilty of selling mortgaged property in the county of the mortgage, though the sale be made by an agent in another county, where the evidence shows that the defendant authorized and directed, and later ratified the sale in the county where the mortgage was given. In the case of State v. Ferris, 16 S. W. (2d) 96, l. c. 100; 322 Mo. 1, the Supreme Court said:

> "Instruction No. 2, given by the court, correctly hypothesized the entire case. It is not subject to tenable objection. Instruction No. 4, given by the court, told the jury in effect that, if they believed from the evidence that the defendant authorized and directed Haley to sell the mortgaged car, the act of Haley in making the sale was the act of the defendant. This instruction correctly declares the law authorized to be given under the evidence."

A defendant may be prosecuted for selling mortgaged property in the county of the mortgage, though he, himself, complete the sale in another county, where the evidence shows that the property was taken to another county with the intention of selling it there.

In the case of State v. Perry, 87 S. C. 535, l. c. 540; 70 S. E. 304, the Supreme Court of South Carolina had under consideration a statute similar to the Missouri statute, and facts similar to the facts submitted in your letter when it said:

"The remaining question discussed is whether there was error in refusing a new trial on the ground that there was no evidence to show a sale or disposition of the property in Saluda county. There was testimony that defendant admitted that he sold one bale of cotton grown upon the land described in the mortgage and there was testimony that he was seen in a wagon with two bales of cotton about two miles from his home in Saluda county going towards Batesburg in Lexington county, but there was no evidence that the sale was made outside Saluda county. The argument that a mere removal of property within the county of Saluda is not a violation of the statute is not applicable to the case presented, which involves not merely a removal but an acutal disposition of the property. If it should be conceded that the cotton was removed from the place where produced in Saluda county, with intention to dispose of it in Lexington county, and was sold or disposed of in the latter county, the statute would be violated in either county, for the act of removal is inseparably connected with the disposition, an essential part of it, and within the prohibition of the statute.

"It may be that a mere removal of property subject to a lien for the better protection of the property and the lien may be regarded as innocent and not within the purview of the statute, as suggested in Whaley v. Lawton, 57 S.C. 264, but a very different matter arises where the removal is for the purpose of sale or disposition and culminates in a disposition of the property."

CONCLUSION.

We are of the opinion that where mortgage property is sold in violation of Section 4100 R. S. Mo. 1929, the venue may be placed, according to the evidence, either in the county where the mortgage was executed or in any county where the property is taken with the intention of disposing of the same.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

WOS:H

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

SHERIFFS - A sheriff may receive only a reasonable compensation for caring for a jury, not to exceed $2.00 per day for each juryman and the officer in charge.

May 29, 1936

5/29

FILED
35

Honorable Percy W. Gullic
Prosecuting Attorney
Oregon County
Alton, Missouri

Dear Sir:

This will acknowledge receipt of your request of May 18, 1936 for an opinion, which reads as follows:

> "Would you please inform me as to what the Sheriff is allowed under the law for taking care of a jury.
>
> "Is the Sheriff allowed the full $26.00 per day for caring for a jury, or is he just allowed what it actually costs to keep them up to that amount?"

We point to the applicable statutes with reference to the question presented by your request.

Under the provisions of Section 3826, R. S. Mo. 1929 relating to the duty of the sheriff to supply jurymen with board and lodging, it provides in part as follows:

> " ** when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; ** "

The above quoted portion of the section of the statute contemplates that only a reasonable compensation may be allowed in caring for jurymen who are not permitted to separate, and that such compensation shall not exceed $2.00 per day for each juryman and the officer in charge. The statute in nowise provides that a full $26.00 per day shall be allowed for the caring for a jury. The inhibition expressed is that such compensation shall not exceed two dollars per day.

Under the provisions of Section 3841, R. S. Mo. 1929, relating to the clerk's duty to make out the fee bill in any criminal causes, it is stated:

> "The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 3842, R. S. Mo. 1929, relating to the duty of the prosecuting attorney and judge with respect to fee bills in criminal causes, provides as follows:

> "It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges

> are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

You will note from the above quoted sections of the statute that it becomes the duty of the Prosecuting Attorney to "strictly examine each bill of costs which shall be delivered to him", and whether or not the services have been rendered for which charges are made. It becomes the further duty of the Prosecuting Attorney to present such fee bill to the judge, either in term time or in vacation, who shall subsequently certify the same to the State Auditor.

There would be no reason to assume that under the above provisions set forth that a sheriff should be allowed a full amount as indicated by Section 3826, as the limitation expressly provides that the reasonable compensation shall not exceed $2.00 per day for each juryman and the officer in charge.

CONCLUSION.

In light of the above, it is the opinion of this department that a sheriff may only receive for the caring for the jury what such sheriff has actually expended, as

being reasonable compensation, not to exceed $2.00 per day per juryman and officer in charge.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:FE

BRIDGE LAW:)
ST. CHARLES COUNTY BRIDGES:)
LEWIS & CLARK BRIDGE COMPANY:)

1. Validity of St. Charles County Bridge Contract.
2. Costs of operating, maintaining and repairing bridges must be paid out of bridge tolls before funds set aside for principal and interest on bonds.

June 27, 1936.

7/2

FILED
35

Mr. Earl C. Gray
County Clerk
St. Charles County
St. Charles, Missouri

Dear Mr. Gray:

This is to acknowledge receipt of your letter in which you request the opinion of this Department, which letter is as follows:

> "Questions would like to have answered concerning the proposed purchase of Lewis & Clark Bridges by St. Charles County.
>
> "1. If the order of the Court authorizing the Presiding Judge and the County Clerk to sign the preceding agreement is rescinded by the County Court would said agreement be void.
>
> "2. Should it not be possible to void the signed agreement does the law provide that operation and maintenance expense shall have priority over monthly payments for retiring revenue bonds.
>
> "3. Is there anything in the statutes to prevent all expenses of the County Court and Clerk, and other County officials to be paid out of the tolls collected."

Attached to your letter of request is a transcript of the proceedings of the County Court of St. Charles County pertaining to the purchase by said County of the property of the Lewis and Clark Bridge Company.

During the May Term, 1936, on May 13, 1936, the seventh day of the May Term, the following record entry was made:

> "In the matter of considering the purchase of the Alton-St. Louis Bridge Company Property.
>
> "Alfred L. McCawley and William Waye representing the Lewis and Clark Bridge Company appeared before the Court relative to negotiations whereby the County of St. Charles would purchase the property of said bridge company and pay off the bonds issued in payment of the same, out of the revenue collected as toll. The purchase of this property would be according to an act passed by the 57th General Assembly of Missouri appearing in the laws of Missouri, Extra Session 1933-34 on pages 115 to 117 inclusive. Jos. B. Wentker, Prosecuting Attorney, acted as legal adviser for the County Court. No. decision was reached and the Court continued the matter under advisement."

And on Wednesday, May 20, 1936, the eleventh day of the May Term, we find the following record:

> "In the matter of the purchase of the Lewis and Clark Bridges.
>
> "The Court at this time again takes up for consideration the purchase of the Lewis and Clark Bridge Company property. After due consideration of the matter, all judges concurring, it is hereby ordered, adjudged and decreed by the County Court of St. Charles County, Missouri, acting under and pursuant to the authority of an act of the 57th General Assembly of Missouri, approved December 22nd, 1933 and appearing in Laws of Missouri, Extra Session 1933-34 at pages 115 to 117 inclusive; that the said County enter into an agreement with the Lewis and Clark Bridge Company, a Missouri Corporation, which said agreement shall be substantially in the following form, to-wit:"

And following said record entry is the proposed agreement, consisting of fifteen pages, between the Lewis and Clark Bridge Company, a Missouri corporation, and the County of St. Charles, setting forth in detail and with paticularity the proposed contract, in which contract the County agrees to purchase the Lewis Bridge spanning the Missouri River near Fort Bellefontaine, Missouri, and the Clark Bridge spanning the Mississippi River at Alton, Illinois, and having its southern terminus within said county for which said properties the county agrees to issue anddeliver unto the Company in full and complete payment for said property toll bridge revenue bonds of said county in the principal amount of $2,757,000.00, said amount of bonds to be issued in two series to be designated respectively, Series A and Series B; Series A in the principal sum of $2,332,000.00, bearing interest at 3 3/4 per cent per annum, payable semi-annually, and the bonds of Series B in the amount of $425,000.00 with interest at the rate of four per cent per annum, payable semi-annually. And it is further recited in said contract that all of said bonds shall be issued under the terms and provisions of the Act of the 57th General Assembly of the State of Missouri, Laws of Missouri, Extra Session, 1933-34, at pages 115 to 117.

And immediately following said contract and agreement, we find the following:

> "Be it further ordered, adjudged and decreed by the court that the Presiding Judge of this court be and he is hereby authorized, ordered and directed to execute the foregoing contract on behalf of the County of St. Charles, and the Clerk of this Court be and he is hereby authorized, ordered and directed to attest such execution under the seal of the Court."

And we next find, on the same day of said court, an order for the issuance of the bonds, stated in the caption of said order of the County Court, as follows:

> "An order authorizing and directing the issuance of two million, seven hundred and fifty-seven thousand dollars ($2,757,000.00) toll bridge revenue bonds of the county of St. Charles, in the State of Missouri, under the provisions of House Bill Number 10 of the Acts of the Extra-

> ordinary Session of the Fifty-Seventh General Assembly of Missouri (1933-34) for the purpose of providing funds for acquiring a toll bridge across the Missouri River near Fort Bellefontaine, Missouri, and having its northern terminus within said county, and a toll bridge across the Mississippi River at Alton, Illinois, and having its southern terminus within said county, together with roadways and approaches appertaining thereto; prescribing the form of said bonds and the interest coupons to be attached thereto, providing for the collection, segregation and distribution of revenues derived from the tolls to be charged for traffic on and over said bridges, and making provision for the payment of the principal of and interest on said bonds."

And then is set forth in full the contract referred to above.

Referring to the first question asked in your letter of request we take it that you desire to know whether or not the agreement entered into by the County Court with the Lewis and Clark Bridge Company may be rescinded without the consent of the bridge company, by the County Court, that is, if the order of the court authorizing the Presiding Judge and the County Clerk to sign the agreement is rescinded by the court, would said agreement be void?

We have very briefly set forth the orders of the County Court relative to the execution of this contract. The contract is set forth in full in the transcript accompanying your request, and reference may be made thereto.

Section 2962, Revised Statutes of Missouri, 1929, provides:

> "No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract

> be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

By the provisions of the Laws of Missouri, Extra Session, 1933-34, pages 115-117, by Section 2 thereof, counties and other public agencies are authorized to acquire, own and operate, construct, or aid in the construction, in whole or in part, improve or extend, and maintain toll bridges, etc., such as are described in the foregoing contract entered into between the Lewis and Clark Bridge Company and the County of St. Charles, Missouri. By Section 3 of said Act all public agencies named in Section 2 are authorized and empowered to issue negotiable toll bridge revenue bonds and sell such bonds to the United States government, or any other authorized agency thereof, or other investor or investors.

It will therefore be seen that under the Act of the 57th General Assembly, Extra Session, aforementioned, that counties such as St. Charles have the statutory authority to purchase, own and operate the bridges mentioned and described in said contract and agreement.

Coming now to the direct question asked in your letter, that is, is the contract entered into between the aforesaid parties revocable by St. Charles County without the consent of the Lewis and Clark Bridge Company? We do not think so on the face of the record as set forth in the transcript accompanying your request, and which is, of course, the only matter before us.

We assume, of course, that the May Term of the St. Charles County Court has not finally adjourned and is open for such lawful orders as may be made in connection with the above matter.

No reasons have been stated by you in your request for the revocation of said contract; therefore, base our opinion solely on the bald question as to whether the county court may arbitrarily rescind the contract on the record before us. We take it that you mean whether or not the county court may, without incurring any future responsibility or liability, rescind the contract in question. Recission has been defined in Black on Rescission and Cancellation, Vol. 1, 2d Ed., Section 1, page 3:

> "To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it."

The County Court is a court of record. Article VI, Section 36, Missouri Constitution. There are many cases in Missouri to sustain the rule and it is well-settled that all courts of record have the power on their own motion to modify or set aside judgments, orders or entries during the term at which they are made.

> In Re Henry County Mut. Burial Ass'n., 77 S. W. (2d) 124;
> Bartling v. Jamison, 44 Mo. 141-145;
> McNalty v. Hawkins, 163 Mo. App. 692-695;
> Rottman v. Schmacker, 94 Mo. 139;
> Aull v. St. Louis Trust Co., 149 Mo. 1;
> Bruegge v. State Bank of Wellston, 74 S. W. (2d) 835;
> Caldwell v. Lockridge, 9 Mo. 214.

The general rule on the question of reconsideration and rescission of contracts and acts by a county court is stated in 15 C. J. page 470, Section 123, as follows:

> "Where a county board or court exercises functions which are administrative or

> ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action; but in no event has such court or board the power to set aside or to modify a judicial decision or order made by it after rights have lawfully been acquired thereunder, unless authorized so to do by express statutory provision." (Italics ours)

The rule of law announced in Corpus Juris above is followed and reaffirmed in the case of Mead v. Jasper County, 266 S. W. l. c. 469.

In Black on Recission and Cancellation, Vol. 2, 2d Ed., Section 332, page 892, it is stated:

> "The ordinary rules governing the rescission of contracts are also applicable to contracts made by counties, cities, and other municipal corporations. Thus, a municipal corporation has no lawful right to repudiate or rescind a valid contract which it has lawfully entered into for the purchase of property, the supply of commodities needed for municipal purposes, or of gas, water, or electric light for municipal use, or the employment of persons to act for it in a business capacity, not being public officers or agents. For contracts of this kind are not made in the exercise of the governmental powers of the municipality, but of its proprietary or business powers, and are governed by the rules applicable to contracts made by individuals or business corporations. Such a contract, when fairly made, without fraud or imposition on the part of the other party, and without misconduct or bad faith in the officers acting in behalf of the municipality, and which is not unreasonable, cannot be repudiated by the municipality after the other party has expended money or labor in reliance on it, and so long as he complies with its provisions."

And in 15 C. J., page 555, Section 251, it is said:

> "Where a county has, by its properly constituted authorities, entered into a valid contract, it cannot, without good ground and without the consent of the other contractual parties, rescind such contract;"

In the case of State v. Morgan, 144 Mo. App., l. c. 40, it is said:

> "The rule is well-settled that a county court may revise or rescind an order at the term or session at which such order is made provided this be done before any rights have accrued under the order. (11 Cyc., 403; Matthews v. Cook Co. Commissioners, 87 Ill. 590; Dresden v. County Com'rs, 62 Me. 365; Makemson v. Kauffman, 35 Ohio 444; Higgins v. Curtis, 39 Kan. 283; Campbell v. Park, 32 Ohio 544; Jaquith v. Putney, 48 N. H. 138."

This opinion is based solely on the contract and agreement and the record of the proceedings of the County Court of St. Charles County as contained in the transcript attached to your letter of request.

In the instant case the court considered the matter of the purchasing of the bridges while it was in session on May 13th, and on May 20th, in open court, the court had before it for consideration the contract in question and it ordered that the said county enter into an agreement with the Lewis and Clark Bridge Company, a Missouri corporation, and then set forth on its record said agreement and by record entry ordered and directed the Presiding Judge of said court to execute the foregoing contract on behalf of the County of St. Charles and the Clerk of the Court was authorized and ordered and directed to attest such execution under the seal of said court, which was accordingly done according to the record submitted herewith. Under the terms of this contract by Section 14 it is provided that after June 1, 1936, the net income of the operation of said

bridges shall accrue to and belong to the county and the bridge shall be operated by the Bridge Company until the final consummation of the contract.

It is, therefore, the opinion of this Department that the Lewis and Clark Bridge Company is bound by its contract and likewise the County of St. Charles, and the County cannot rescind said contract without the consent of the bridge company. There is no question but that the order made by the County Court directing the Presiding Judge to execute the contract could have been annulled before the execution of the contract but after it was signed and sealed by the officers of the County and accepted by the bridge company and rights had lawfully been acquired thereunder (except for matters dehors this record) it was then beyond the power of the County Court to rescind same, without the consent of the bridge company.

II.

Since it is our opinion that the contract submitted to us in the transcript of the proceedings cannot be rescinded by the county court without the consent of the Lewis and Clark Bridge Company, we come now to the second question requested in your letter.

The contract provides that the expenses of operating, maintaining and repairing the bridge shall be paid out of tolls before payment on the principal and interest of the bonds, we think it is plain that this contract must be so construed.

Under the provisions of Section 3 of Laws of Missouri, 1933-34, Extra Session, it is provided in part as follows:

> "In the event of the issuance and sale of bonds authorized by this Act by a public agency, such agency shall charge a reasonable toll for the use of any such toll bridge, the amount of which toll shall be sufficient to pay the reasonable cost of maintenance, repairing and operating such bridge and to provide a sinking fund sufficient to amortize and repay any such loan, including interest and financing cost."

While the act itself does not state that the cost of maintaining, repairing and operating such bridge shall be paid before the provisions are made for the sinking fund, it is provided in the contract between the bridge company and the county that out of the gross income and revenues of said bridge after the necessary expense of maintaining, repairing and operating the same shall have been provided for, there shall then be set aside revenue for the payment of the interest and principal of the bonds.

We think it clear that when the contract is read in connection with the bridge act it is clear that the tolls must first apply to the maintenance, repairing and operation of the bridge and that the remainder should be applied to the sinking fund to retire the toll bridge revenue bonds.

In the case of State ex rel. City of Hannibal v. Smith, 74 S. W. (2d) 367, the City of Hannibal agreed to charge such toll for the use of the bridge as would be sufficient to pay the bonds and the interest and also the costs of operating, maintaining and repairing the bridge; however, in the event the revenue was insufficient to pay the bonds and the interest and the cost of operating, maintaining and repairing the bridge, the City of Hannibal agreed to pay these costs and expenses out of some other funds of the City but did not agree to pay the bonds and interest out of other funds.

From the above and foregoing it is our opinion that the cost of operating, maintaining and repairing the bridges must come out of the bridge tolls and must be taken care of first before funds are set aside for the payment of principal and interest on the bonds. In any event, under the bridge act and the contract under same, there is no liability on the taxpayers of St. Charles County for the payment of costs of operation, maintenance and repairing or principal and interest on bonds, but all must come out of bridge tolls alone.

As to the third question submitted, we will send a supplemental opinion on same.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

CRH:EG

INSURANCE - Reciprocal contracts in insurance may be issued that are non-assessable.

8-1

July 31, 1936

FILED
35

Honorable W. W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

This department is in receipt of your letter of July 23 requesting an opinion from this department as follows:

> "Consolidated Underwriters of Kansas City, Missouri, is a reciprocal exchange organized and existing under the laws of the State of Missouri. It has been in existence for many years and at the present time has a surplus on hand over all legal liabilities of substantially $1,115,210.00. The attorney-in-fact in charge of the management for such exchange is T. H. Mastin & Company, through whom subscribers thereat exchange indemnity contracts. This exchange of indemnity contracts is authorized by power of attorney executed by each subscriber (copy of which is hereto attached). By virtue of such power of attorney and upon recommendation of the attorney-in-fact, additional subscribers are admitted from time to time to this exchange. (Copy of contract issued by attorney-in-fact to said subscribers is hereto attached.)
>
> In the light of the foregoing, will you please advise me whether in your opinion the power of attorney and policy, supra, constitute a non-assessable insurance contract, and whether subscribers at the foregoing exchange may legally exchange

> non-assessable policies or indemnity contracts, upon which contracts of indemnity by virtue of the foregoing no liability is attached to such subscribers for the payment of an assessment upon the happening of contingencies in the future."

Article XI, Chapter 37 R. S. Mo. 1929 contains the statutory law of Missouri governing this form of insurance and Section 5966 thereof expressly authorizing individuals, partnerships and corporations of this state to exchange reciprocal or inter-insurance contracts with each other or with individuals, partnerships and corporations of other states and countries.

Section 5971 R. S. Mo. 1929 provides for the required reserves of the nature and amount of guarantee funds and it also provides for funds deposited to make up any deficiency. If there be any prohibition against the exchanging of reciprocal and inter-insurance contracts, upon which contracts no liability is attached to the subscribers for the payment of an assessment upon the happening of contingencies in the future, it is by reason of the following provision in Section 5971 supra:

> " * * * If at any time the amounts on hand are less than the foregoing requirements, the subscribers or their attorney for them shall make up the deficiency. * * * "

However, the Supreme Court of Indiana in the case of Automobile Underwriters Incorporated v. Wysong, 184 N. E. 783, has recently passed on a question substantially similar to that here involved and has construed that section of the Indiana law substantially the same as the provision heretofore referred to in Section 5971. That section of the Indiana law reads as follows:

> "If at any time the assets so held in cash or such securities shall be less than required above or be less than $25,000 the subscribers or their attorney for them shall make up the deficiency within thirty days after notice from the Auditor of State to do so."

The court in holding that this section of the Indiana law did not require the deficiency to be made up by assessment but that the failure to keep up the standard of solvency furnished ground for the revocation of the right to continue business said:

> "The law authorizes the organization of reciprocal insurance associations of this kind. Those who join the association, do so voluntarily and also voluntarily subscribe to all of the conditions and limitations. While the plan of association of members in a reciprocal association is different from that of an ordinary corporation, yet the idea of limited personal responsibility is practically the same. The members or stock holders of a corporation limit their personal liability in the business conducted to the amount of the face value of their stock, while the members of a reciprocal association limit their personal liability by an agreement between themselves. The degree of limitation may vary. It may be fixed at one annual premium or deposit, or it may be one additional annual deposit, or it may be unlimited. The statute gives the attorney in fact authority to insert in any form of policy any provision or condition not inconsistent with nor in conflict with the laws of the State of Indiana. This authorizes a limitation clause as to personal liability and as a stock holder in a corporation is not liable personally beyond the face value of this stock, unless in cases where the statute specifically fixes an additional stock holders liability, so a member of a reciprocal association is not liable beyond the terms of the policy issued by his association unless the statute fixes an additional liability. The question then arises, does the statute contemplate any personal liability beyond that fixed by the terms of the policy issued? The only provision of the statute that defendant claims to fix such liability is found in Section 6 and reads as follows:

'If at any time the assets so held in cash or such securities shall be less than required above or be less than twenty-five thousand dollars, the subscribers or their attorney for them shall make up the deficiency within thirty days after notice from the Auditor of State to do so.' This language certainly does not impose an assessment upon the members who by authority of the statute have contracted between themselves that no assessment shall be made after the initial payment or premium on the policy has been paid. It does require, however, that a certain standard of solvency shall be maintained by the subscribers or their attorney. A failure to do this may result in a forfeiture of the right to do business. The statute then does not exact arbitrarily an assessment but gives the alternative of a refusal, suspension or revocation of a certificate of authority or license to do business. Under this statute, if an assessment is required, who would be assessed? The statute says the subscribers or their attorney shall make up the deficiency. One would be just as liable to be assessed as the other. If both are to be assessed, upon what basis? What part is to be assessed to the attorney and what part to the subscriber? Are the subscribers to be assessed alike? Are the responsible subscribers liable for the pro rata share of the irresponsible subscribers? Can the attorney in fact assess the subscribers for the deficiency that the statute says he is also required to maintain or visa versa? Other suggestions could be made that would almost make it conclusive that the Legislature did not intend to and is not requiring that the deficiency shall be made up by assessment, but that the alternative for failure to keep up the standard of solvency as required is to revoke the right to continue business. This construction gives harmony and practicability to the whole statute.

"* * * If the policy issued is non-assessable by the terms and conditions of the policy itself, the plaintiff by issuing the policy as non-assessable is not representing it to be anything different from what the members of the association have directed it to be and from what the statute permits to be done. The members contract that in issuing the policy their attorney do not make them jointly liable with any other subscriber but bind them for not more than their pro rata share on any one contract, the maximum liability to be limited to the premium deposit or application fee provided for in the policy. The attorney in fact is not authorized to contract or incur obligations unlimited in any respect but all the liability he may incur has the limit fixed at the amount of premium the members pay for his policy and every one dealing with the attorney in fact is bound to know of that limitation. Third party creditors are not innocent creditors if they contract with the attorney in fact beyond his authority to bind. The policy holders or members of the association are not in the association for profit but for reciprocal protection among themselves. It is not a commercial venture with them nor can we assume that it is their purpose to obtain safety insurance to the extent of risking individually all they are worth to attain such an end but rather their purpose is to obtain insurance at a minimum cost upon the standard of solvency fixed by the Legislature.

* * * * * * * * *

"Any stranger dealing with a reciprocal insurance association must know that he is not dealing with an ordinary agent merely acting within apparent authority in binding his principal while in fact acting beyond the scope of his authority as between him and his principal, but that he is dealing with an attorney in fact with written authority limiting his powers, beyond which limitation he cannot bind.

* * * * * * * * * * *

"Unless these subscribers have the right to limit their liability in any way they choose, they cannot limit it to their pro rata share or equitable portion of any loss and if they can limit it at all, they can limit it in any degree by terms that they may mutually agree upon. They have limited their liability by agreement among themselves in effect that no assessment shall be made against them for any purpose. Hence the policy is non-assessable."

CONCLUSION

In view of the above we are of the opinion that individuals, partnerships and corporations of this state are authorized to exchange reciprocal and inter-insurance contracts with each other or with individuals, partnerships and corporations of other states and countries, and that said contracts may legally provide that no liability shall extend to said subscribers beyond that specifically provided in the contract. In other words if the provisions of Article 11, Chapter 37 R. S. Mo. 1929 are fully complied with, subscribers may definitely limit their liability by their contracts of insurance, and if it is so provided in said contracts, policies may be issued which are non-assessable. As was said by the Supreme Court of Indiana, if the subscribers can limit their liability at all, they can limit it in any manner upon which they may mutually agree. If by agreement they limit their liability to the extent that it is provided that no assessment shall be made against them for any purpose, the policy is non-assessable.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:SW

INSURANCE: Subscriber's Agreement of Consolidated Underwriters authorizes attorney in fact to issue non-assessable policies.

August 24, 1936.

FILED
35

Honorable W. W. Graves,
Prosecuting Attorney,
Jackson County,
Kansas City, Missouri.

Dear Sir:

This department is in receipt of two copies of Subscriber's Agreement or Power of Attorney in use at Consolidated Underwriters of Kansas City, Missouri.

We have examined the powers conferred upon the attorney in fact by the subscribers or policy-holders and note that by Section 6 the liability is limited to the surplus accumulated from the moneys of the particular subscribers.

In view of our opinion rendered to you on the 31st day of July, 1936, relative to reciprocal contracts in insurance, we are of the opinion that the power of attorney submitted authorizes the attorney in fact of this exchange to issue non-assessable policies.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General

JWH:AH

TAXATION: (1) Owner may purchase at tax sale for high bid on third offer.
(2) Proceeds of sale to apply to costs and to be prorated to funds.
(3) Abandonment of suit does not prevent sale of property at third offering for high bid.

10-19

October 16, 1936

FILED
35

Honorable J. B. Greer
County Collector
Pettis County
Sedalia, Missouri

Dear Mr. Greer:

We acknowledge receipt of your communication requesting an opinion of this office on the following matters:

> "(1) Has the property owner the right to buy at tax sale on the third offering at the high dollar?
>
> (2) When property is sold at tax sale on the third offering at the high dollar, how are the proceeds from the sale to be applied and is court order to be obtained for the balance?
>
> (3) Where suits were filed several years ago but no judgments taken, and costs have accrued such as Circuit Clerk's costs, Sheriff's costs, Attorney fees, etc., and properties are now offered at tax sale on third offering, do these conditions change the status of the case, or may the same be sold at the high dollar? If so, how should the suit costs, etc., be prorated?"

We shall deal with your problems in the order in which they are presented.

I.

Property owner may purchase at third offering for a high bid.

After land has been offered for sale on two previous years and no bid sufficient has been made at each of those sales to cover the amount of taxes, interests, penalties and costs then due, the County Collector is authorized at the third offering to sell the certificate of purchase covering said tract to the highest bidder for what it will bring. This procedure is provided for in Section 9953a, Page 432, Laws of Missouri 1933. This Section reads as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

This Section places no limitation upon the parties who may bid in said property at the third sale. A careful examination of this law reveals that at no point is any requirement laid down as to who may purchase the land, other than Section 9952c, which requires that no sale shall be made to a person not a resident of the State of Missouri until such person shall file with the Collector an agreement in writing consenting to the jurisdiction of the Circuit Court of the County in which the sale is made and designating some person in said county as agent for the purchaser for the purpose of suit. The failure of the present Act to

speak on this subject relegates us to the application of general principles and rules to a determination of your question. After careful consideration of the problem involved, we have reached the conclusion that the property owner has the right to buy at the tax sale on the third offering if he makes the high bid for the certificate. To rule otherwise would be to unfairly and unjustly discriminate against the property owner for he would then be the only one who would be disqualified from bidding at the sale. Such classification would be unwise, unfair and in the absence of specific legislation, wholly unwarranted.

In reaching this opinion we are not unmindful of the general statement found at 11 C. J. 1198, Section 1615:

> "As a general rule any person under a positive duty to the state or municipality to pay the taxes on a particular tract of land cannot become a valid purchaser at a sale of the property for such taxes, and if he does purchase, it is deemed to be merely a mode of paying the taxes and does not found a new title in any way."

Also, 61 C. J. 1305, Section 1826:

> "Ordinarily one who is under a duty to pay taxes cannot add to nor strengthen his title by purchasing land at a sale for such taxes, and an attempt to do so may be regarded simply as a redemption of the land. Thus, ordinarily the owner of land can neither add to nor strengthen his title by omitting to pay taxes on land for which he is liable and then buying the land at the tax sale."

Nor have we disregarded the statements to a similar effect found in the leading text books on the subject of taxation. However, an examination of the authorities which are cited in support of these statements indicate that they have relation to the rights of third parties as affected by the tax sale rather than the right of the State, and are concerned with the legal effect of the sale rather than the bare right of the owner to purchase.

In making your inquiry you are concerned with your duties in relation to the sale and we understand desire to know whether or not you should refuse the bid of an owner of the property at the third sale even though this bid is not in an amount sufficient to pay the whole taxes, interest and costs due. You can only be concerned with your rights and duties in the premises and are not called upon to decide and determine the legal consequence of such a sale. If the facts are such that such sale to the owner amounts to but a redemption of the property, as has been suggested in some of the authorities, that is a matter with which you are not now authorized to act. You should of course, as a representative of the State and County in conducting the sale permit no sale for less than the full amount of the taxes, penalties and costs which has been induced by collusion or fraud as such a sale would clearly amount to a redemption of the property or a payment of the taxes in the amount bid and would subject the property to further sale the following year as contemplated and required by Section 9953b, page 432, Laws of Missouri 1933, which reads as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

CONCLUSION

It is therefore the opinion of this office that the property owner has the right to buy the property at the tax sale on the third offering for the highest bid.

II.

Proceeds to be applied to costs and balance distributed to fund.

It is somewhat difficult to determine the question you had in mind in paragraph two of your letter. However, in general terms, the proceeds of the sale, when such proceeds are insufficient to cover the entire amount of taxes, penalties and costs, should be applied as follows: (a) To the payment of costs, other than collector's commission. (b) Collector's commission, calculated upon the amount received less amount of costs referred to in "a". (c) The balance of the proceeds should be paid to the various taxing authorities or agencies, such as the State, the County, School District, etc., in the same proportion as the amount received bears to the total amount of tax.

From your view point you are interested in knowing how you shall account for the balance of taxes which have been charged against you. The situation under the Jones-Munger Law is identical in this respect as to the situation as existed under the old law when property was sold for taxes under execution and the proceeds of the execution sale were insufficient to pay the full amount of taxes due. You should obtain a Court order covering this so that you will have no difficulty when making your final settlement and so that the State Auditor's Office may allow you a credit for the difference in the amount of taxes charged against you and the amount which you received at the sale of the property.

The foregoing is concluded from two opinions heretofore issued by this office, the first on January 18, 1934, to the Honorable Edward Cusick, Prosecuting Attorney of Pulaski County, Waynesville, Missouri, and the second dated January 3, 1935, to Honorable W. C. Rose, Prosecuting

Attorney, Putnam County, Unionville, Missouri. I herewith enclose to you copies of these opinions so that you may be fully advised as to the authorities for the conclusions reached.

III.

Court costs preserved though taxes foreclosed under Jones-Munger Law.

The Jones-Munger Law makes specific provision for the abandonment of suits for the foreclosure of taxes and proceedings for including such delinquent taxes in the sale of other properties under the new tax law. Section 9962b, page 444, Laws of Missouri 1933, having particular reference to this, reads as follows:

> "All lots, tracts and parcels of land upon which taxes assessed or levied prior to the taking effect of this act remain due and unpaid at the date when such taxes would have become delinquent as provided in the act under which they were assessed and levied, and which taxes are not merged in judgment prior to the effective date of this act, shall be deemed to be delinquent under the provisions of this act, and the same proceedings shall be had to enforce the paymentof such unpaid taxes, with interest, penalty and costs, and payment enforced and liens foreclosed under and by virtue of the provisions of this act and the same rights of redemption shall attach. For the purposes of foreclosure under this act, the date of delinquency shall be construed to mean the date when the taxes first became delinquent; provided

> however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

It will be noted that in the event the suit is abandoned and the property sold under the Jones-Munger law, rights are preserved "to all valid costs and commissions which may have already attached to such character of suits." Therefore, the collector's and sheriff's costs which had already accrued are preserved, and the attorney fees, which can only be calculated on the amount actually paid into the treasury, are likewise preserved but may only be calculated as just stated. As it is the costs which accrue under the Jones-Munger Law which actually bring about a sale of the property and create a fund from which costs and taxes may be paid, it is our

view that the actual costs accruing under the Jones-Munger Law, other than the collector's commission, should first be paid. Next should be paid the costs accruing in the suit instituted but abandoned, other than the attorney's fee and the collector's commission. Third, the attorney's fee and the collector's commission should be calculated, based upon the amount which is to be turned into the Treasury. The balance if any, should then be distributed as suggested under part two of this opinion. The basis for these conclusions is also found in the opihions hereinbefore referred to.

Section 9953a, page 432, Laws of Missouri 1933, authorizes the sale of the certificate to the highest bidder in the event that for two successive previous years no person has bid a sum equal to the delinquent taxes, penalties, interests and costs accrued thereon. This section applies to all sales for taxes which are delinquent under the provisions of the law. By virtue of Section 9962b, Supra, these taxes are delinquent within the meaning of the law if the county collector in his discretion determines to abandon the suits and proceeds to enforce the payment of the taxes under the Jones-Munger law. We are of the opinion that because suit has once been instituted and abandoned does not prevent the properties from being sold for what they will bring on the third offering providing no sufficient bid has been made at the two previous offerings.

CONCLUSION

It is therefore the opinion of this office that the fact that suit had once been instituted for taxes on a given tract of land, which suit was abandoned, does not prevent the sale of such property at the third offering for what it will bring, provided that said tract has been offered at two prior successive sales in previous years at which sales no bid was received sufficient to pay the delinquent taxes thereon, with interest, penalties and costs.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosures-2

TAXATION: Delinquent taxes bear interest at six per cent if taxpayer in bankruptcy.

October 17, 1936

10-24

FILED
35

Hon. Joe Grandhomme
Collector of Revenue
St. Francois County
Farmington, Missouri

Dear Mr. Grandhomme:

We are in receipt of a communication from the State Auditor's Office requesting us to render you an opinion on the subject matter of your communication to the State Auditor October 5, 1936. The question presented is "May a bankrupt land owner pay his taxes for the years 1934-35 exempt from the payment of additional interests and penalties which have accrued because of the delinquency of the taxes."

I.

Bankrupt taxpayer liable for six per cent interest on delinquent taxes paid pending bankruptcy proceedings.

This office had occasion to consider carefully the liability of a railroad in bankruptcy for the payment of penalties upon its delinquent taxes. On March 26, 1935, this office rendered an opinion to the Honorable David R. Clevenger, Prosecuting Attorney of Platte County, wherein the following conclusion was reached:

> "It is therefore the opinion of this office that the Trustees of the Chicago, Rock Island and Pacific Railroad Company are liable to the State of Missouri as interest on delinquent taxes six per cent per annum on such taxes from the date of delinquency until paid."

We have considered this opinion in relation to the general tax laws and have reached the conclusion that there is no distinction between the status of a real estate owner in bankruptcy and a railroad organization under Section 77b of the Bankruptcy Law insofar as liability for interest on delinquent taxes is concerned. We herewith enclose to you a copy of that opinion.

CONCLUSION

It is therefore the opinion of this office that the taxpayer is liable for simple interest calculated at six per cent per annum upon delinquent taxes for the years 1934 and 1935 and that the taxpayer is not liable for the ten per cent penalty referred to in Section 9952, page 429, Laws of Missouri 1933.

The foregoing conclusion and opinion upon which it is based is reached upon the assumption that the real estate upon which the bankrupt is attempting to pay the taxes is a part of the bankrupt estate and within the jurisdiction of the bankruptcy court. There is a strong likelihood that the property upon which the taxpayer is seeking to pay taxes has been set aside to him as exempt or that the trustee in bankruptcy has released the property from the estate as having no value to the estate. Under such circumstances there would be no basis for the acceptance of less than the full amount of penalties, interest and costs accrued. These additional facts are not set forth in the inquiry and therefore we are unable to go into this feature of the matter more fully. You will note that the foregoing opinion deals only with penalty interest, and is not to be construed as holding that the bankrupt estate is not liable for the legal costs which have accrued to county officials for services actually performed in the collection of the taxes.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

CIRCUIT CLERKS: Deputy Circuit Clerks in Shelby County entitled to compensation fixed by County Court within Statutory limitations.

January 14, 1936.

1-15

FILED 37

Mr. Estel T. Hardy
Clerk of the Circuit Court
Shelby County
Shelbyville, Missouri

Dear Sir:

We acknowledge receipt of a request for an opinion from your deputies, Mary C. Ralls and Thelma Hewitt. Said request reads as follows:

> "The Clerk of the Circuit Court and Ex-Officio Recorder of Shelby County, Missouri, requires two deputies in order to carry on his office routine properly. There has been difference of opinion concerning the salary allowed for deputy hire in this office.
>
> "We would like to have an opinion on Section 11812, entitled 'The Deputy or Assistant Circuit Clerk's Compensation' to be found on page 371 in the Missouri Laws, 1933; particularly the clause which reads as follows:
>
> " " 'The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed.'
>
> "Does this mean that each deputy may be allowed a compensation

> amounting to $1100 annually or does it mean that this amount shall be divided among the deputy hire.
>
> "We trust that you may be able to send us an opinion on the aforementioned question at an early date."

Section 11808 Laws 1933, p. 370, reads as follows:

> "The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

The population of Shelby County, according to the last decennial census was 11983. Section 11811 Laws 1933, p. 370 provides in part as follows:

> "The aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * *in counties having more than 11,500 persons and less than 12,500 persons, the clerks shall be allowed to retain $1300.00 for themselves, and shall be allowed to pay for deputies and assistants $1100.00;* * * *."

Section 11812, Laws 1933, p. 371 provides:

> "Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such officials, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge

of the duties of his office. The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting and appointment to be made, and may reduce the compensation theretofore fixed by it."

Section 11680 R. S. Mo. 1929, provides:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

CONCLUSION.

Under Section 11811, supra, the County Clerk in counties the size of Shelby County, is allowed to retain

from fees which he collects $1300.00 for himself and $1100.00 for deputies and assistants.

Under Section 11812, supra, the Legislature has limited the amount payable in the Circuit Clerk's office for deputy and clerk hire in counties of 12,500 persons and less. Shelby County falls within this class of counties. Said counties must limit clerk and deputy compensation not to exceed the amount allowed deputies and assistants to the county clerk of Shelby County. In other words, the County Court is limited to $1100.00 expenditure per year for deputy and assistant hire in the Circuit Clerk's office in Shelby County, regardless of the number of such assistants.

Respectfully submitted.

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

SCHOOLS: Interest collected on delinquent taxes is in effect a part of the tax and should be distributed in proportion to the amount each levy bears to the total.

January 24, 1936.

1-28

FILED
37

Mr. George Harrington
Collector, Revenue Department
Jackson County
Court House
Kansas City, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"It has been the practice in this county for at least thirty years to divide the interest collected on back taxes between the county, state, Kansas City schools and Independence schools, theirs being the major portion. It being generally understood that the collection of the moneys for the smaller incorporated schools does not pay for itself, their portion of the interest has gone to the county.

"Since taking over the collector's office I have impounded this money and desire an opinion from you so that I may make proper distribution of same."

Section 9867, R. S. Mo. 1929, provides as follows:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner and not to exceed the rates prescribed by the Constitution and laws of this state, viz: The state

> tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

The county court fixes the rate of taxation for county purposes. Section 9872, R. S. Mo. 1929. The rate for state purposes is fixed by statute. Section 9866, R. S. Mo. 1929. The rate of taxation for school purposes is purely local and set by the voters in the district or the board of directors. Section 9214, R. S. Mo. 1929 and Chapter 57, R. S. Mo. 1929 and amendments.

As to interest on delinquent taxes on real estate, Section 9945, Laws of Missouri, 1933, page 426, provides in part as follows:

> "* * *; all taxes hereafter becoming delinquent shall bear interest until paid as provided by section 9952, * *"

Section 9952, Laws of Missouri, 1933, page 429, referred to in Section 9945, supra, provides in part as follows:

> "* * * and charging them with the amount of delinquent tax * * * and an additional annual ten per centum on taxes for each year prior to the preceding year, * * *"

It is thus seen from a reading of Sections 9945 and 9952, supra, that delinquent taxes on real estate bear interest and is an additional percent on said taxes. In other words, the interest on delinquent taxes is a part of the amount to be collected as same is additional to the tax.

For the convenience of the taxpayer only one tax statement is issued to comply with the provisions of Section 9867, R. S. Mo. 1929. However, on that tax statement the rate of levy is specifically shown, namely, the amount for state purposes, for county purposes and for school purposes, and when a taxpayer receives his statement he only pays the total amount shown on the tax bill and then from that total amount is deducted the various amounts that go to the state, the county and the schools.

When taxes are delinquent the interest is computed on the total amount of the taxes for state, county and schools. Thus, interest is charged on that portion represented by the levy for school purposes and, consequently, should belong to that portion of the tax from whence it was derived.

The reason advanced by you why smaller school districts do not receive that portion of the interest due them, is because it is a smaller amount. However, the principle remains the same, namely, if a part of the tax could be taken all of it could be taken. Hence, if it is right for the interest to be taken from the smaller schools it would be just as right to take the interest from the larger schools and place it all in the county revenue. Thus, the reason assigned is not an excuse, a justification or a right to deprive the smaller schools of any portion of the interest due them on delinquent taxes levied for their districts.

From the above it is our opinion that by virtue of Sections 9945 and 9952, supra, the interest derived from delinquent taxes should be distributed to the state, county and schools in proportion to the amount that said levies bear to the entire tax bill, and no small school should be deprived of its pro rata amount.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

SALARY: ROAD OVERSEER: Recovery of back salary as road overseer.

3-30

March 10, 1936.

FILED
37

Hon. Chas. M. Hardin,
Judge, Jefferson County Court,
Hillsboro, Missouri.

Dear Sir:

This department is in receipt of your letter of March 4th wherein you state as follows:

> "Section 7892, Rev. Statutes, Missouri 1929: Provided a salary for Judges of County Courts in all counties in this state, with a population of not less than fifty thousand nor more than two hundred thousand.
> Sec. 2092 Rev. Statutes Mo. 1929, provided a salary for County Judges of a county with more than sixty thousand population for the years 1931 and 1932.
>
> For the 1931 term, Jefferson County's population was more than fifty thousand inhabitants, as determined by Sec. 11808, Rev. Statutes 1929. All other county officers were receiving a salary based on Sec. 11808.
>
> This section provides for counties which now have or may have hereafter, more than two hundred miles of macadamized or rock public roads:
>
> For the 1931 term, Jefferson County had a total mileage of 998 miles of roads, and 616 miles of macadam and gravel or rock roads, measured by the State Highway Department, and 232 miles of macadam and rock roads, measured by P. M. Reilly, Jefferson County Highway Engineer.

County may now have or may hereafter have a total taxable wealth of more than twenty-five million dollars:

During the 1931 term, Jefferson County had more than twenty-five million dollars of taxable wealth, and did not contain a city of the first class.

Section 9874 provided for the apportionment of the County funds:

First: A sum to care for paupers,
Second: A sum for the building of bridges and repairing of roads, and
Third: Compensation of road overseers.

Section 7892 states: And for the purpose of seeing that the roads contemplated by said subdivision two of Sec. 9874, are each and every one kept in repair and for the purpose of personally viewing new road and bridge sites which are the subject of petition, and through personal supervision of seeing that all road work is done in a proper and workmanlike manner.

The matter of personally seeing to the construction and completion of the road and bridge work was done by the County Court, together with the Engineer. The requirements of said Sec. 9874 was complied with as the record will show. However, being unaware of the provisions of Sec. 7892, there was no record of performance as a board of road overseers, except the record of having ordered road and bridge work done.

It appears, had the Court been familiar with the provisions of Section 7892, at the beginning of the 1931 term, it would have been entitled to the salary provided by said section.

Therefore, I would like to have an opinion on the following questions:

First: What material constitutes a macadam or rock road?
Second: Would all the mileage of the macadamized or rock roads in all road

districts in the county be included in the meaning of said Section 7892, Rev. Statutes Missouri 1929, and
Third: In view of the above mentioned conditions is there any reason why the Court should not collect a back salary for the 1931 term as a Board of Road Overseers?"

I.

In answer to your first question as to what material constitutes a macadam or rock road, we feel that same could be better answered by your own County Engineer or the State Highway Department. Some suggestion is found, however, in the case of Partridge v. Lucas, 99 Calif. 519, 33 Pac. 1082, wherein the court in defining the term "macadamize", indicates that the material for a macadam road would consist of small stones, thus:

> "The word 'macadamize' has a fixed and definite meaning, and refers, not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid. It means to cover a street or road 'by the process introduced by Macadam, which consists of the use of small stones of a uniform size consolidated and leveled by heavy rollers.' 13 Amer. & Eng. Enc. Law, p. 1194."

As to what material constitutes a rock road, the answer appears to be obviously "rock". Such term is defined in the case of Okey v. Moyers, 91 N. W. 771, thus:

> "In geology every layer which forms a portion of the solid crust of the earth is called rock, but in its popular acceptation the term embraces only the solid portions of the earth. Webster defines it as 'a large concrete mass of stony material.' The Standard Dictionary: 'Technically, a rock is a mixture of mineral substances, except when it is one species, in a bed or mass. The constituents of rock are mineral,

although they may be organic in origin.' The Encyclopedia Brittanica, Vol. X: 'A rock may be defined as a mass of material matter composed of one or more, usually of several, kinds of minerals, having as a rule no definite external form, and liable to vary considerably in chemical composition.'"

II.

Section 7892, R. S. Mo. 1929, provides as follows:

"The judges of the county courts in all counties in this state which now have, or may hereafter have, a population of not less than 50,000 nor more than 200,000 inhabitants, and which now have, or may hereafter have, more than two hundred miles of macadamized or rock public roads, and which now have, or may hereafter have, a total taxable wealth of over twenty-five million dollars and not containing a city of the first class shall be and constitute a board of road overseers for such counties for the purpose of seeing that the fund provided for by subdivision two of section 9874 shall be expended as provided in said second subdivision of said section 9874, and for the purpose of seeing that the roads contemplated by said subdivision of said section are each and every one kept in good repair, and for the purpose of personally viewing new road and bridge sites which are the subject of petitions for improvement, and for the purpose, through personal supervision, of seeing that all road improvements are completed in a good and workmanlike manner, and that all work of every kind done on the county roads is done in a proper workmanlike manner. Each member of said board shall, as compensation, solely for his services as such road overseer, receive a salary of twelve hundred dollars per annum to

> be paid by the county, monthly, in equal monthly installments out of the fund mentioned in said subdivision two of section 9874. The time, place and manner of holding meetings of said board and the rules and regulations for the performance of the duties shall be fixed by said board."

The above section does not say that the two hundred miles of macadamized or rock public roads is exclusive of the mileage of the macadamized or rock roads in all road districts in the county, and hence we are of the opinion that all the mileage in the road districts is to be included within the meaning of Section 7892, supra.

III.

In asking whether there is any reason why the Court should not collect a back salary for the 1931 term, we assume you are referring to the salary of county judges elected at the general election in 1930 and who took office on January 1, 1931--Section 2073, R. S. Mo. 1929.

You state that during the 1931 term, or from January 1, 1931, to January 1, 1933, the population of Jefferson County was more than 50,000 inhabitants as determined by Section 11808, R. S. Mo. 1929, which provides that:

> "For the purpose of determining the population of any county in this state, as a basis for ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants, the highest number of votes cast at the last previous general election, whether heretofore or hereafter held in such county, for any office, shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county."

Section 11808, supra, was repealed by the Laws of Missouri, 1933, page 369, and a new section passed. However, same would have no bearing since the question would have to be determined by the law that was in effect during the 1931 term.

You further state that during the 1931 term the county had more than two hundred miles of macadamized or rock public roads, taxable wealth of more than $25,000,000, and that it did not have a city of the first class. This would clearly bring the court within the provisions of Section 7892, supra, as constituting the county court a board of road overseers, and each member of the court entitled to a salary of $1200 per year.

Section 2092, R. S. Mo. 1929, provides in part that:

> "In all counties of this state now or hereafter <u>having less than sixty thousand inhabitants</u>, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having sixty thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than sixty thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term."

The above section was amended by the Laws of Missouri, 1931, page 191, to "all counties of this state now or hereafter having less than seventy-five thousand inhabitants," and the entire Section 2092 read thus:

> "In all counties of this state now or hereafter having seventy-five thousand inhabitants and less than ninety thousand inhabitants, the judges of the county court shall receive an annual salary of twenty-five hundred dollars. <u>Said salary</u> to be in lieu of the per diem heretofore

allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R. S. 1929. In all counties of this state now or hereafter having ninety thousand inhabitants and less than one hundred fifty thousand inhabitants, the judges of the county court shall receive an annual salary of three thousand dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, as provided by section 7894. In all counties of this state now or hereafter having one hundred fifty thousand inhabitants and less than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of forty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R. S. 1929, and in lieu of all other fees, compensation, or salaries, heretofore allowed by law to said judges, except the per diem as allowed to said judges as members of the board of equalization and board of appeals. In all counties of this state now or hereafter having more than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of six thousand dollars. Said salary of six thousand dollars to be in lieu of the per diem heretofore allowed by law to such judges of the county court, and in lieu of the salary as road overseers heretofore allowed by law to said judges, as provided in section 7897, R. S. 1929, and in lieu of all other fees, or salaries, heretofore allowed by law to said judges, except the per diem allowed to said judges as members

> of the board of equalization and the board of appeals. The salaries herein fixed for the judges of the county court in all counties of this state having more than seventy-five thousand inhabitants shall be paid in equal monthly installments as the salaries of other county officers are paid. In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term."

We assume that although Jefferson County had more than fifty thousand inhabitants during the 1931 term of the county court, yet at no time did it have as many as sixty thousand inhabitants. If such be the facts, the amendment of Section 2092, supra, making it applicable to counties of less than seventy-five thousand inhabitants would not have affected the court's salary for the 1931 term. Thus we see that during the 1931 term, or from January 1, 1931, to January 1, 1933, Jefferson County came within the provisions of Sections 7892 and 2092, supra.

It is to be noted that in counties having certain populations it is specifically stated that the salary is in lieu of Section 7892, R. S. Mo. 1929. However, such language is not used for counties under seventy-five thousand inhabitants, and we are of the opinion that the judges of Jefferson County Court would have been entitled during the 1931 term to a salary of $1200 per year as members of the board of road overseers.

46 C. J., Sec. 275, page 1027, makes the following statement (citing many cases):

> "The acceptance of less compensation than that established by law for the office does not estop an officer from subsequently claiming the legal compensation."

Section 862, R. S. Mo. 1929, provides that the five-year statute of limitation runs on:

> "Second, an action upon a liability created by a statute other than a penalty or forfeiture."

In the case of State ex rel. Wingfield v. Kansas City, 236 S. W. (Mo.) 516, an employee who was wrongfully discharged as a civil service employee sued for his salary. The court, in holding that his recovery for compensation due him was subject to the five-year statute of limitation, said:

> "Moreover, we hold that section 1317, R. S. 1919, does apply; this being 'an action upon a liability created by a statute other than a penalty or forfeiture,' and that this case is governed by the five-year period of limitations."

From the foregoing, we are of the opinion that the judges of the county court may collect a back salary for the 1931 term, or from January 1, 1931, to January 1, 1933, subject to the five-year statutory period of limitation which started running January 1, 1931. We are further of the opinion that, since the members of the court were entitled to be paid monthly as members of the board of road overseers, only two months' salary, to-wit, January and February of the year 1931, has been barred by the statute of limitations.

Respectfully submitted,

J. E. TAYLOR,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

TAXATION: Supplemental opinion to opinions dated November 24, 1934 and April 13, 1935, to Walter H. Miller and Battle McCardle respectively.

March 10, 1936.

3-16

FILED
37

Hon. Will H. Hargus
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Hargus:

Acknowledgment is made of your recent communication requesting an opinion of this office on the following matter:

> "In response to my inquiry with reference to the right of a county court to correct errors, including erroneous valuations, there were furnished me copies of opinions rendered by your office to Senator J.C. McDowell, dated February 15, 1933, and to Honorable Battle McCardle, dated April 13, 1935. I have since examined copy of opinion rendered by your office to Honorable Walter H. Miller, County Assessor of Jackson County, Missouri dated November 24, 1934, to which reference is made in the opinion to Honorable Battle McCardle.
>
> I am uncertain about the present effect of your opinion to Honorable Walter H. Miller, of November 24, 1934, when read in the light of the other two opinions mentioned, and I shall appreciate it if you will advise me further as to the extent to which a county court in this state may go in correcting errors in cases where the court is satisfied that the tax has been levied upon an erroneous valuation."

Since receiving your communication above set out this office has reconsidered the subject matter of the opinions referred to in your communication. As a result the opinion to Honorable Battle McCardle dated April 13, 1935, is hereby withdrawn, leaving the opinion to the Honorable Walter H. Miller, Assessor of Jackson County, Missouri, dated November 24, 1934, as the present view of this office on the power of the county court to correct errors in valuation. It is to be noted that in the opinion to the Honorable Walter H. Miller the constitutionality of the section therein considered was not gone into and we do not in this opinion pass upon the constitutionality of said section.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

TAXATION: Delinquent taxes of cities of the fourth class.

June 15, 1936.

6-15

FILED
37

Honorable George Harrington
Collector Jackson County
Court House
Kansas City, Missouri

Dear Mr. Harrington:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

> "I have been requested by the Mayor of Blue Springs, Missouri, to collect their delinquent taxes. He has cited Sections 9945, 9949, 9950, 9952 and 9970 Session Acts 1933 as his authority.
>
> It is my understanding that Blue Springs is a city of the Fourth class and that Sections 6995 and 6996 R. S. Missouri 1929, govern the collection of their taxes and that no duties are involved upon me as county collector.
>
> The seven items involved in this matter are 1931 taxes amounting to a total of $49.48. I am not selling taxes of Jackson County this year, having the suits including 1931 filed. To sell the Blue Springs items therefore would be quite an additional expense, several times greater than the commissions retained from their collection.
>
> Will you please give me your opinion in regard to this matter,"

This office has heretofore had occasion to investigate this matter and on June 27, 1933, an opinion was issued at the request of the Honorable Minor C. Livesay, Prosecuting Attorney of Morgan County, relative to the duty of the City Collector of the City of Versailles, Missouri, a City of the Fourth Class, to forward to the County Collector the list of delinquent lands and lots for the purpose of enforcing the payment of such delinquent taxes. In this opinion we reached the following conclusion:

> "It is therefore the opinion of this Office that your City Collector (City Collector of Versailles, Missouri) is not required to deliver a list of delinquent and unpaid city taxes to your County Collector under the provision of Section 9970 as amended by the 57th General Assembly."

We herewith enclose to you a copy of this opinion so that you may know the grounds upon which it rests.

CONCLUSION.

In view of the foregoing, it is the opinion of this office that you as County Collector of Jackson County, Missouri, are not required to proceed with the collection of the delinquent taxes due the City of Blue Springs, Missouri, but that the duty to collect such delinquent taxes rests upon the City Collector of Blue Springs.

Respectfully submitted,

HARRY G. ALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

SCHOOLS - School districts are exempt from purchasing state automobile tags.

8-19

August 18, 1936

FILED
37

Honorable E. O. Hammond, Superintendent
Plattsburg Public Schools
Plattsburg, Missouri

Dear Sir:

This will acknowledge receipt of your request of August 15, 1936 for an opinion, which reads as follows:

> "Our board of education is considering buying a bus for the purpose of transporting school children.
>
> "We have been told that a school board does not have to carry liability insurance. We also understand that such a bus is exempt from the state automobile license tax."

In response to the first question you have propounded, we are enclosing herewith copy of an opinion dated April 10, 1933 addressed to the Honorable Charles A. Lee, State Superintendent of Public Schools, which opinion was written by George B. Strother, an Assistant Attorney General, and approved by Roy McKittrick, Attorney General.

The provisions of Section 7767, R. S. Mo. 1929, Subdivision (b), provides in part as follows:

> "** and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates: PROVIDED, HOWEVER, that there shall be displayed on each side

> of such motor vehicle, in letters not less than three inches in height with a stroke of not less than 3/8 of an inch wide, the name of such municipality, county or political subdivision, the department thereof, and a distinguishing number. No officer, or employe of the municipality, county or subdivision, or any other person shall operate such a motor vehicle unless the same is marked as herein provided, and no officer, employe or other person shall use such a motor vehicle for other than official purposes."

The above quoted part of the statute specifically exempts motor vehicles owned and operated by municipalities, counties and other political subdivisions of this state from the provisions of the article requiring registration, proof of ownership and display of number plates. It also requires that no officer or employe of the county or subdivision, or any other person, shall operate such a motor vehicle unless upon the said motor vehicle there is displayed on each side, in letters not less than three inches in height with a stroke of not less than three-eights of an inch wide, the name of such municipality, county or political subdivision.

The rule is universal that the public schools system has long been a part of the State Government as they perform and exercise a governmental function; their property is strictly public property, and their funds are expended only in the furtherance of the education of persons entitled thereto. City of Edina vs. School District of Edina, 267 S. W. 112.

In the case of State vs. Whittle, 63 S. W. (2d), l.c. 102, the Supreme Court quoted approvingly a definition given by a standard text relating to a school district being a political subdivision as follows:

> "A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools."

Thus, it may be seen that a school district within the purview of the above definition is properly a subdivision of the State, and as such we deem to be exempt within the meaning of Section 7767, supra.

CONCLUSION

In light of the above, it is the opinion of this department that a school district is exempt from the provisions of Article I, Chapter 41 relating to the registration of their motor vehicles used in the transporting of school children.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:FE

JURORS: Traveling expenses

October 19, 1936 10-20

FILED 37

Mr. Fred W. Harvey
Clerk of Circuit Court
Knox County
Edina, Missouri

Dear Sir:

This department is in receipt of your letter of September 29, requesting an opinion as to the following:

> "I am asking your opinion in a matter pertaining to per diem of jurors.
>
> "1. If a juror reports on the first day for which he is called and is then dismissed for a period of two days or more, should be receive mileage for both trips? and
>
> "2. Should a juror receive mileage for each adjourned term to which he is ordered back? or
>
> "3. Should he receive five cents for each mile necessarily traveled going from his place of residence to the court-house and returning to same. (ONE TRIP per Term) "

Section 8763, Revised Statutes Missouri 1929, provides:

> " Each grand and petit juror on the regular panel shall receive three dollars per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his

place of residence to the courthouse and returning to the same, to be paid out of the county treasury."

We assume that your request refers to this section of the statute, and while it is silent as to the questions asked by you,nevertheless,it is the opinion of this department that where there is an intervening day caused by order of the court that the juror should be paid the necessary traveling expenses in traveling from his place of residence to the courthouse and returning to same. We believe this to be a matter of general practice and is an equitable interpretation of the statutes.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

PUBLIC ADVERTISEMENTS - Newspaper distributed gratuitously not qualified for legal publications.

2-27

February 20, 1936.

FILED
38

Hon. C. R. Hayes,
Prosecuting Attorney,
Salem, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of December 20, 1935, such request being in the following terms:

> "There is a newspaper that has been published under the name of the "Advertiser" with free circulation and has been published weekly for more than three years to date with a circulation of around 2000, but has not been admitted to the mails under the second class rate.
>
> Should this publication be authorized under existing postal regulations to be mailed under permit at the second class rate, would legal publications therein be permissable under existing laws of the State of Missouri?"

R. S. Missouri, 1929, Section 13775, was repealed and a new section enacted in lieu thereof by Laws of 1931, page 303, such new section providing as follows:

> "All public advertisements and orders of publication required by law to be made, and all legal publications affecting the title to real estate, shall be published in some daily, triweekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of one year; shall have a list of bona fide subscribers voluntarily en-

"gaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time. Provided that when a public notice required by law to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this act. All laws or parts of laws in conflict with this section, except sections 13777, 13778, 13779, 7631, 7632 and 7633, Revised Statutes of Missouri, 1929, are hereby repealed."

If by the phrase "free circulation" in your letter you mean that this newspaper is distributed gratuitously, then it is not a newspaper complying with that part of Section 13775 above quoted which has been underlined, and consequently could not qualify under that section. You will observe that Section 13775 as it appears in the 1929 revision of the statutes contained no provision requiring a newspaper to be paid for to qualify as a legal publication, and apparently the addition of this requirement in the 1931 statute was directed toward disqualifying newspapers having no paying subscribers.

In conclusion, it is our opinion that a newspaper not having a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for a subscription for a definite period of time, would not be qualified to publish public advertisements and orders of publication required by law to be made, or legal publications affecting the title to real estate, so as to comply with the requirements of law of this State, and particularly Laws of 1931, page 303.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

SCHOOLS: Fencing and athletic field is a school purpose for which a district can levy a tax within constitutional limitations.

March 24, 1936.

3-24

FILE 38

Honorable P. C. Hays
Secretary of School Board
Poplar Bluff, Missouri

Dear Sir:

We acknowledge your request for an opinion directed to us over your signature through Honorable Dwight Brown, Secretary of State, as follows:

> "I'm sure that you receive a lot of peculiar requests and probably I should not make this one but knowing you as I do I dont believe that you will object to my asking the favor of you. As you know, the School District of Poplar Bluff recently acquired several acres of the old Jesse Reynolds 'Brick Yard' for a new high school site - when the district was able to finance such a project and necessity demanded.
>
> "The Board has gone to considerable expense to level the site for an athletic field and by W. P. A., aid has provided for the completion of the 'field' but now we need a fence around the 'field' and are contemplating submitting to the voters a proposition to put a 10 cent levy of taxes for that purpose. This additional levy will be in excess of the Constitutional limit provided in Article 10, Section 11 but also said section permits this excess 'For the purpose of erecting public buildings' if two-thirds of the voters so assent.
>
> "Now, the question arises in our minds whether the building of such a fence is forward looking enough to be legally declared within the above Constitutional limits. Of course, its the plan and

intent of the district to eventually erect a high school on this site and this fence would be a part and parcel of said high school."

Article X, Section 11, Missouri Constitution, after providing certain limitations on the levy of taxes for school purposes, says:

"Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. For city and town purposes the annual rate on property in cities and towns having thirty thousand inhabitants or more shall not, in the aggregate, exceed one hundred cents on the one hundred dollars valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; and in towns having one

thousand inhabitants, or less, said rate shall not exceed twenty-five cents on the hundred dollars valuation. For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes, and the rate allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the State, or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness

> now existing, or bonds which may be issued in renewal of such indebtedness: Provided, That the city of St. Louis may levy for municipal purposes, in addition to the municipal rate of taxation above provided, a rate not exceeding the rate which would be allowed for county purposes if said city were part of a county."

Your question turns on a determination of what constitutes "school purposes" within the meaning of the phrase as used in the Constitution? Is the building of a fence around the athletic field owned by the school district a "school purpose" within the constitutional provision allowing a district to levy taxes for school purposes, and allowing the voters to increase the annual levy, within limitations, for school purposes? You state in your request that this plot of ground was purchased for a new high school site, and we understand from your letter that the present athletic field is a part of this high school site, and that a new high school on the site is contemplated as soon as necessary legal steps are taken and necessary funds are provided. You state that this proposed fence is planned as a part of the permanent improvements of this high school site belonging to the school district. You state that "its the plan and intent of the district to eventually erect a high school on this site and this fence would be a part and parcel of said high school." The phrase "school purposes" as used in this constitutional provision has been judicially construed in Peter v. Kaufmann, 38 S. W. (2d), 1062, l. c. 1066, as follows:

> "Section 11, Art. 10, of the Constitution places limitations on the annual rates of taxation which can be levied for school purposes, which term is construed to cover all the usual and ordinary expenses of maintaining and operating schools."

CONCLUSION.

This department is of the opinion that the School Board of Poplar Bluff can levy a school tax, and the

people in the district can vote an increased levy in school taxes to raise funds for the purpose of putting a fence around the school property described in your request, and, at the same time, not violate the provisions of Article X, Section 11, supra, limiting all tax levies by a School Board to "school purposes."

The property was purchased and intended as a high school site. The athletic field under modern pedagogy theory is almost as essential to education as the class room. The theory is, that a sound physique is as essential to the proper educational program as a sound mind. The phrase "school purposes" as used in the Constitution was not intended to limit the school levy for purposes directly and immediately subject to use in the school room, but said phrase allows a levy for purposes contributing to and aiding in the education of persons.

An athletic field on this site with a fence around it intended for the recreation of students of the district while attending school, is a "school purpose". Such an expenditure is a usual and ordinary expense of supplying and maintaining a school.

Respectfully submitted.

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

ESTRADITION: Member of conspiracy in Kentucky, never present in Missouri, is not a fugitive, though conspiracy was consummated in Missouri. Jurisdiction of Missouri Courts to try conspirator living in Kentucky.

May 23, 1936.

5-23

FILED
38

Honorable James Haw
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

We have your request for an opinion with reference to the murder of one Larry Bud King which occurred in Mississippi County May 3, 1936. From the statement of facts it appears that one Gilliam, a resident of Kentucky, hired Riley and Pugh in Kentucky to murder King in Missouri, the motive being the collection of insurance carried on King's life by Gilliam; that pursuant to such conspiracy Riley and Pugh came to Missouri and committed the crime and that Gilliam at all times remained in Kentucky. The two questions presented by you are: (1) The jurisdiction of the State of Missouri to try Gilliam. (2) Can Gilliam be extradited from Kentucky.

I.

THE JURISDICTION OF THE STATE OF MISSOURI TO TRY GILLIAM.

There is no doubt but that Gilliam could be tried in this state for first degree murder because he was a member of the conspiracy to kill and murder one King. In a conspiracy the act of one is the act of all. State vs. Reich, 293 Mo. l. c. 423; State vs. Linders, 299 Mo. 671; State vs. Broyles, 317 Mo. 284; State vs. Nasello, 30 S. W. (2d) 133. With reference to hiring killers, and members of the conspiracy being absent at the time of the crime, State vs. Boesel, 64 S. W. (2d) 243, follows the well established rule that a conspirator is guilty personally even though he was not present at the commission of the crime. You will find an instruction laying down the general rule of conspiracy in this State in the case of State vs. Lackmann, 12 S. W. (2d) 424.

It is therefore the opinion of this office that Gilliam may be tried in this State for first degree murder.

II.

CAN GILLIAM BE EXTRADITED FROM KENTUCKY.

This matter presents a very serious problem since the right to extradite fugitives is purely a matter of Federal Law. Without such federal law there would be no authority for extradition. Rummerfield vs. Watson, 70 S. W. (2d) 895. From the Watson case the following facts must appear to authorize requisition:

> "(1) That the person named in the requisition is demanded as a fugitive from justice; (2) that the demanding executive has produced a copy of an indictment found, charging the person demanded with having committed a crime; (3) that such copy has been certified as authentic by the Governor of the state making the demand; (4) that the person demanded is a fugitive from justice."

For the purpose of this opinion we concede that the first three above requirements can be met. We think the fourth requirement cannot be met in view of Hyatt vs. New York, 188 U. S. 691, 47 L. Ed. 657: Pertinent portions of that opinion by the Supreme Court of the United States are as follows, l. c. 661:

> "It is, however, contended that a person may be guilty***within a state without being personally present in the state at the time. Therefore the indictments found were sufficient justification for the requisition and for the action of the governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the state of Tennessee at the time of the commission of those acts for which he had been indicted,* * * *

> The exercise of jurisdiction by a state to make an act committed outside its borders a crime against the state is one thing, but to assert that the party committing such act comes under the Federal statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition."

l. c. 662:

> "It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed."

The Court finally held in the above case that since the defendant was not within the demanding state at the time of the alleged commission of the crime, he could not be a fugitive from justice within the meaning of the Federal Statute upon that subject; that in order to come within the fourth requirement of extradition as laid down by the Supreme Court of Missouri in the Watson case supra, a person cannot be a fugitive <u>from justice</u> if he were not in fact <u>present</u> in the demanding state on the day of the alleged crime.

It is therefore the opinion of this office that Gilliam cannot be extradited under the Federal Law.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

FER:MM

ELECTION : Relating to permanent registration in Sedalia

September 30, 1936. 10-1

FILED
38

Honorable Frank W. Hayes, Chairman,
Pettis Co. Democratic Central Committee,
Sedalia, Missouri.

Dear Mr. Hayes:

This department is in receipt of your letter of September 25, inquiring as follows:

> "Sedalia comes within the class of cities between ten thousand and thirty thousand, as provided for under the registration laws passed in 1933. There seems to be some question as to whether there shall be a general registration held before the Presidential election, at which time all voters shall be required to register, or whether only those voters who have become of age or changed their address shall register. I am of the opinion that the persons who have previously registered need not again, unless they have moved from one precinct to another. We will have a registration here in a short time and in order to avoid any misunderstanding and confusion, I wish you would have Mr. McKittrick issue an opinion on the matter. * * * * *"

Your letter refers to registration in cities of from 10,000 to 30,000 inhabitants, which is often referred to as the permanent registration law of cities of certain population. The title of this Act, Laws of Mo. 1933, p. 239, contains the following provision:

> " * * * * relating to the same subject matter for towns of 10,000 to 30,000 inhabitants, providing for a system of permanent registration in said class of cities * * * * *"

Section 5, Laws of Mo. 1933, p. 241, contains this provision:

> "In all cities of this state which now contain or may hereafter contain 10,000 inhabitants and less than 30,000 inhabitants, at each general election for State officers, there shall be elected, in each election district or ward of such cities, by the qualified voters of such election district or ward, one registrar of election, who shall have the qualifications of an elector in his election district or ward and be the owner of real estate in this State, and who shall hold office for four years and until his successor is elected and qualified * * * * * "

Section 6a, p. 242 provides:

> "Said registrars shall meet and hold sessions for the purpose of registration of voters at all the times necessary as provided in this act; which said board shall also meet ten days prior to any general, special or primary election, or any general, special or primary city election, for a period of not to exceed two days and at least five days before said election for the purpose of making up an alphabetically arranged list of the voters in a book for each of the precincts of each of the wards or districts of their respective cities."

Section 9 of the Act, P. 243 is as follows:

> "The board of registrars of each city containing 10,000 and less than 30,000 inhabitants, shall meet at the city hall, and shall appoint days of registration, not to exceed

> three in each election district of said cities, which shall be within 40 days next preceding the tenth day prior to every biennial election; the said board shall also appoint, at least 10 days before any special or municipal election or primary, state, county or city, held in their said city, days of registration, not exceeding two, in each election district of said cities for the purposes of such special or municipal elections, or state, county or municipal primary, at which time those who have become entitled to register since the last general registration, or who have for any cause failed or neglected to do so, may register upon compliance with the provisions of this article. All registration of voters under this article shall be held at the city hall, or the place designated for the meeting of the common council of any such city or place or places designated by said board of registrars; and the board of registrars shall give notice of such registration and the place or places where the same is to be held, by publication thereof in a daily newspaper published in said city for five days next preceding such registration."

It is our opinion, however, that Section 10 of the Act is decisive of the question. Section 10 provides:

> "Whenever any person who is qualified to vote has registered in any election district, ward, or precinct, and so long as he is a qualified voter of said city, his name shall be carried on the registration books by the board of registrars and all persons who now are qualified to vote in any city under the provisions of this article shall not be again required to register until they have changed their domicile from the election district, ward or precinct in which they are legally registered."

CONCLUSION

If the City of Sedalia has complied with the provisions of Sections 1 to 30 inclusive of the permanent registration law (Laws of Mo. 1933, pp. 239-249), heretofore, or in 1934, it is the opinion of this department that it is not necessary for any further registration, except as provided in the various sections of the Act, especially Section 9, and that the same constitutes a permanent registration.

You use the term "Presidential election". This, we think, is synonymous with the state election.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CHILDREN:)
SCHOOLS:) defective child if not given education by parents
CHILDREN'S HOME:) until such is 16 years of age, then State Home has right to cite said children and parents before the juvenile court to have said court declare such child neglected, and after declaring such child neglected the custody of said child given to Children's Home.

January 2, 1936.

1-8

FILED
39

Mrs. W. W. Henderson
Executive Director
State Children's Bureau
Carrollton, Missouri

Dear Mrs. Henderson:

This is to acknowledge your letter as follows:

"The State Children's Bureau requests an opinion on Section 9221, Chapter 57, R. S. 1929:

'The State board of charities and corrections is hereby authorized where no special classes have been provided, or instruction arranged for as provided in sections 9218, 9219 and 9220 of this article, and where proper home instructions is not given as provided in section 9434, to take charge of and provide for the proper training of feeble-minded, deaf, blind, and crippled children under the age of sixteen years who have not attained the eighth grade in school. Where, in order to secure such training, it is necessary to incur expense for the transportation, education or maintenance of such child, and where the state board of charities and corrections ascertains upon investigation, that the parent, guardian or other person in charge of such child

is unable to bear such expense, the state board of charities and corrections is hereby authorized to incur such expense for such child, and to charge the same to the county in which it resides. It shall be the duty of the county superintendent of public welfare and of the county superintendent of schools, and of the superintendent of schools in the city of St. Louis, to report to the state board of charities and corrections, all children within their counties and the city of St. Louis who come within the provisions of this section.'

"There has been reported to the State Children's Bureau by O. E. Burke, Superintendent of Schools, Franklin County, Union, Missouri, the case of Frances Downey of St. Clair, Missouri, a deaf and dumb child, aged 13 years. She is entered in the rural school but is not able to learn because the teacher is not trained to teach her. The parents have been unwilling that the child should go to Fulton, but the Superintendent of the State institution at Fulton, insists that after these handicapped children are past 12 years, it is much more difficult for them to learn a mute language.

"The custom in the past has been for the State Children's Bureau to have such a child declared neglected where the parents are unwilling to furnish suitable instruction. Is it your opinion that the State Children's Bureau has the right under this statute and its correlated sections to remove this child from the custody of its parents for the period of the school year, returning her to them during the summer months? The child has other handicaps - goitre, etc. At times she can hear a little bit and with proper treatment her hearing

> might be restored. These are the reasons for our wish to declare her a neglected child and secure for her the proper training. As other cases have arisen in the past and will probably arise again where handicapped children are denied an education by their parents, we should like an opinion as to our rights to remove the children temporarily from the custody of the parents and place them in the proper school, such as the blind and deaf, the same as we do have the right to remove feebleminded children and place them in the school at Marshall. Of course the whole procedure would come under the juvenile court and he might decide there was no dependency and neglect."

Section 9221, R. S. Mo. 1929, is quoted in full in your letter so we will not again set out the provisions of said section.

There is no ambiguity, as we read it, relative to Section 9221, supra, and it merely imposes upon the Board of Charities and Corrections the duty to take charge of and provide for proper training of feebleminded, deaf, blind and crippled children under the age of sixteen years. The manner and method of taking charge of such children is found in other statutes.

As to the manner and method of obtaining possession of children for the purposes enumerated in Section 9221, supra, we quote from an opinion rendered to you on August 8, 1933 as follows:

> "Section 14095 R. S. 1929, creates and establishes an institution so as to provide neglected and dependent children a temporary home pending placement in permanent family homes, proper care and

instructions. Neglected and dependent children, under seventeen years of age, only may be admitted to the State Home. (Secs. 14100 and 14101 R. S. 1929).

"'Neglected' and 'dependent' children are those defined by Section 14101, we quote in part:

> "'(a) Dependent upon the public for support, or (b) in a state of habitual vagrancy or mendicity, or is (c) ill-treated, and that his or her life, health or morals are endangered by continued cruel treatment, neglect, immorality, or gross misconduct of its parents, guardians or custodians.'

"Such children (neglected and dependent) are given to the guardianship of the State Home by formal commitment after citation and hearing.

"Section 14101 R. S. 1929, provides in part:

> "'All commitments to said home shall be made by the juvenile court of the county of such child's bona fide residence. * * * * * *.'

"Section 14102 R. S. 1929, provides in part as follows:

> "'The judge shall thereupon cite the parents, guardians or custodians of such child, if within the county, to show cause before the court, at a time and place named, why such child should not be committed.'

"Section 14103 R. S. 1929, provides in part:

> "'Said judge shall examine into the facts alleged, and if he finds the

allegations of the complaint to be true, etc * * * *, the judge shall enter an order committing the child to the guardianship of said board."

It is our opinion that Section 9221, supra, gives to the State Children's Bureau the right to cause a complaint to be filed before the Juvenile Court in which an alleged neglected child is domiciled and that, after hearing, the court issues a commitment which gives the right of possession and custody of said child to the State Children's Bureau.

It is our further opinion that said Section 9221 does not give the State Children's Bureau the right to take a child from its parents until an order is obtained from the Juvenile Court. In other words, the State Children's Bureau cannot obtain custody of a neglected child without due process of law.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

CIRCUIT CLERKS: Have authority without court order to file papers which the statute authorizes to be filed. Must have court order authorizing filing of any other paper. The legal effect is the same whether the paper is marked filed or whether the record proper shows filing, as the important act is the delivery of the paper to the clerk.

2-6-36

January 31, 1936

FILED
39

Mr. G. L. Heyde,
Circuit Clerk,
Cape Girardeau County,
Jackson, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

> "Will you kindly give me your opinion as to when Court is 'In Vacation'.
>
> "For example, on Saturday the Court adjourned until Tuesday next; in filing Motions, Answers, etc., after adjournment of Court, would it be correct to file same as of 'In Vacation' or 'In Term Time'? And does the Clerk have authority to file same without an order of the Court?"

Section 655, R. S. Mo. 1929, in part, provides as follows:

> "Whenever any act is authorized to be done by or any power given to a court, or judge thereof in vacation, or whenever any act is authorized to be done by or any power given to a clerk of any court in vacation the words 'in vacation' shall be construed to include any adjournment of court for more than one day."

Section 1958 provides as follows:

> "Each judge of the said circuit court, in vacation, shall have and exercise the same powers that he might have and exercise if he were the sole judge of said court."

This section is found under Article 3 of Chapter 9, entitled "Circuit Courts". It would seem, however, to be applicable particularly to cities which have more than one division of circuit court.

Section 1839 provides as follows:

> "The courts, respectively, shall, by rule, direct the pleadings and other papers to be filed in such form as to admit their being conveniently attached together, as required by the preceding provisions, and shall direct their clerks in making up the rolls of the judgments rendered."

Section 1840 provides as follows:

> "It shall be the special duty of every judge of a court of record to examine into and superintend the manner in which the rolls and records of the court are made up and kept; to prescribe rules that will procure uniformity, regularity and accuracy in the transaction of the business of the court; to require that the return, trial, judgment and execution dockets, and all indexes to the records, be correctly made out at the proper time--that the papers be filed and the entries made, and that the duties of the clerks be performed according to law; and if any clerk fail to comply with the law, the court shall proceed against him as for a misdemeanor."

Under the Article entitled "Clerks of Courts of Record", Section 11674 provides that each clerk shall keep at his office "the records, papers, seal and property belonging to his office."

Section 11676 provides that "every clerk shall record the judgments, rules, orders and other proceedings of the court", and do other things therein set forth.

Section 11677 provides as follows:

> "In all civil actions any party interested therein may, upon payment of the fees, have any or all of the following papers recorded in the office of the clerk of the circuit court in the county in which such action is brought: (naming various papers, petitions, summons, affidavit for publication, etc.), and any other paper or pleading tending to show the service on the defendants for their appearance in such case."

In the case of State v. Derkum, 27 Mo. App. 628, the court, speaking of the term "in vacation", said the following, l. c. 631:

> "It is assumed by counsel that, since there is no record entry of the filing, and since the clerk has made the recital in the transcript before us, that the information 'was filed in the office of the clerk of the circuit court, in and for the county of Cole,' etc., the information was filed with the clerk, as distinguished from a filing with the court. But at whatever time an information may be filed, whether in term or in vacation, it is deposited with the clerk, as this one was, and receives his endorsement of its filing, as this one did. The place of deposit is the same, and the clerk's idea of his receiving it in vacation or term time cannot alter the fact. His erroneous idea that the court was in vacation does not make it so. But, as before stated, there was no record entry of the filing of the information. I do not think this renders it invalid. The date of its filing is properly endorsed and signed by the clerk on the back thereof."

In the case of Hadley v. Bernero, 97 Mo. App. 314, the court was considering an unlawful detainer suit and an appeal therein to the circuit court, and in construing the words "term" and "vacation" said, l. c. 319:

> "As to the meaning of the sections of the statutes bearing on this question, we think they use the word 'term' to signify the entire period from the first day of a term as fixed by law to its final close, and the word 'vacation' to signify the period between the adjournment of any term and the beginning of another, not merely an interval when the court is not in session from having adjourned for more than a day but not to court in course."

In the case of Downing v. LaShot, 202 Mo. App. 509, the court, considering an unlawful detainer action, approvingly quotes from the case of Hadley v. Bernero, supra, and from the case of Warner v. Donahue, 99 Mo. App. 37, as follows:

> "'A term of court has been defined to signify the period from the first day of the term fixed by law until court is adjourned to the next court in course, and the word "vacation" has been held to mean the period between the day on which a term of court is adjourned to the next court in course, or until the day of the beginning of another term, and not the mere interval when, for any reason the court is not in session and is adjourned over for more than a day. (State v. Derkum, 27 Mo. App. (K. C.) 628; Hadley v. Bernero, 97 Mo. App. 314; Bronson v. Schulten, 104 U. S. l. c. 415; Brayman v. Whitcomb, 134 Mass. 525.)'"

In the case of Lumber Co. v. Keener, 217 Mo. 522, the court, considering the authority of the clerk to act in getting an order of publication in a suit to quiet title, held that the clerk had authority so to do because it was in vacation of the court, when the facts were that the court on March 20, 1884, adjourned or recessed to June 16, 1884, without closing the term, and between those two dates the clerk issued the order of publication. The court said, l. c. 538:

> "In our opinion the clerk of the Stoddard Circuit Court was authorized to make an order of publication in that suit, for the reason that there was a vacation of the circuit court of that county at the time he made the same."

In the case of State ex rel. Caldwell v. Cockrell, 280 Mo. 268, in considering the duties of the circuit clerk, the court said, l. c. 285:

> "Pursuing the matter further, perhaps needlessly, we will inquire at this point as to the power of a judge over the entries in the record of the proceedings of his court, and the correlative duties of a clerk. A judge's supreme responsibility is in respect of the orders and judgments he makes; no one else can pronounce them, or amend, alter or impair them after they are given, except a court of review: this is the law by an express statute in which clerks are specifically mentioned. (R. S. 1909, sec. 1863.) The judge knows best what judgment he gave and should have authority to see that it is entered so the record will express and preserve it precisely as rendered. For this and other reasons, every judge of a court of record in the State is charged with the special duty of examining into and superintending the manner in which the rolls and records of his court are kept, the entries made, and with proceeding against the clerk as for a misdemeanor, if he fails to observe the law. (R. S. 1909, sec. 3859.) This court has said a judgment is the act of the court, its entry in the record the act of the clerk, the first being judicial, the second ministerial; and that though a judgment derives its force from its rendition by the court, yet one given by a court of record can only be proved by the record. (State ex rel. v. Henderson, 164 Mo. 347.) That being true, the importance

of having the record contain exactly the judgment given, is apparent, as is the necessity for the judge's supervision and control to insure an accurate record. Speaking upon this point the Supreme Court of California said:

"'The records of the courts are necessarily subject to the control of the judges, so far as may be essential to the proper administration of justice . . . . Legislation which could take from its control its records, would leave it impotent for good, and the just object of ridicule and contempt. The clerk, it is true, is a constitutional officer--not subject to appointment or removal by the court--but subject, in the control of the records, to its orders,' etc. (Houston v. Williams, 13 Cal. 24, 28.)

"In People to use of Howard v. Cobb, 10 Colo. App. 478, 483, a clerk and the sureties on his official bond were sued for a deposit of money left with him, and which he entered on the record of the court as having been paid to him as clerk, when in fact the court had made no order for its payment to him in that capacity. The court said, regarding the entry and its effect:

"'An unauthorized entry by the clerk is no part of the records of the court. An order by virtue of which money is paid into court, must come from the court itself, and an entry by the clerk of money as being in court, no matter in what form or in what book, without such order is nugatory..... Orders, judgments and decrees are made and rendered by the court in the exercise of its judicial functions, and these cannot be delegated.'

"In Mayor of Baltimore v. County Comm'rs, 19 Md. 559, the case was to recover fees paid by the plaintiffs in a criminal case for which it was asserted the county was

liable. The transcript showed these fees had been taxed as costs by the clerk of the court where the criminal cases were tried, but did not show they had been allowed by the judge of said court. It was contended the clerk was the hand of the court and every entry must be presumed to have been made by order or in the presence of the judge. The court said as to this at page 564:

"'The clerk is the amanuensis, it is true, of the court, but he must profess to act by the authority of the judge in making his entries of the proceedings, to give them validity. The awarding of costs is the act of the court, their taxation or computation, according to the list of fees prescribed, is a duty imposed by law on the clerk, subject to the supervision of the judge; but the allowance of compensation to an officer of the court, in addition to the sum allowed by law (and not to exceed a certain sum, as the judge may deem just and proper, is a judicial, not a clerical act, which must be evidenced by some order entered under the authority of the judge, and purporting to be so.'

"A text work of merit thus states the rule:

"'In recording and making up the proceedings of the court he (viz. the clerk) may be said to act as its (viz. the court's) amanuensis and subject to its control.' (11 C. J. 887, citing 7 Cy. L. & P. 219, 223.)

"The powers and duties of a clerk are as well settled as those of a judge. We have seen that the statutes forbid him to alter or impair a record, and they expressly command him to 'record the judgments, rules, orders and other proceedings of the court' (Italics ours). (R. S. 1909, sec. 2685.) The authorities are uniform in declaring that in performing this duty he acts ministerially and subject

to the court's control. (11 C. J. 887; K. C. Pump Co. v. Jones, 126 Mo. App. l. c. 540; LaCoste v. Eastland, 117 Cal. 673; Ex parte Brown, 166 Ind. 593, 602; Vanderkarr v. State, 51 Ind. 91; Comstock v. Gage, 91 Ill. 328; Baltimore v. Baltimore Co., 19 Md. 554; Hirsh v. Twyford, 40 Okla. 220, 223.) In the case last cited the rule is thus stated:

"'The clerk's duties are ministerial and largely clerical. He is the arm of the court for which he is clerk, and it is his duty to make a record of the proceedings, orders, judgments and decrees of his court, but in so doing he acts as the amanuensis of his court and subject to its control. Record entries are valid only when made under the judicial sanction of his court.'

"An appellate court of this State said in the first case cited above:

"'A clerk is a mere ministerial officer, the hand of the court, and has no authority to enter a judgment not pronounced by the court. His entry of a judgment in the records is designed to stand as a perpetual memorial of the court's action, but the judgment itself "is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict." The entry by the clerk of a judgment the court did not render was a nullity.' (126 Mo. App. l. c. 540.)

"This excerpt is taken from Ling v. King, 91 Ill. 573:

"'The clerk, in all cases and in all his official acts, whether in term time or in vacation, performs them as a ministerial officer. He so acts in entering up a judgment in term time, under the direction of the judge, who considers and decides.'"

The Civil Code of Missouri provides that a party litigant has the statutory right to do certain things with reference to filing pleadings in the cause. For instance, it is made his duty to file his answer during the first day of the return term if he desires to answer. Certain other rights may be exercised by him by leave or order of the trial court. As to those rights of filing papers that the statute gives him, the same may be filed without an order or record leave from the court. As to those rights which are accorded him by the law, conditioned on the trial court making an order of record so authorizing him, it is the litigant's duty who seeks to file such papers to get permission and order of the trial court so to do. However, while it is discretionary with the trial court to grant or withhold permission to litigants on that class of orders, such discretion may not be arbitrarily exercised. It is rather a sound judicial discretion. Where the trial court is invested with the authority to exercise a sound judicial discretion, the appellate courts will not interfere with that exercise unless there appears to the appellate court an abuse of that discretion from the record in the cause. When such abuse does appear, and the record shows that the trial court arbitrarily exercised his judgment, the appellate court will reverse the cause where substantial rights have been affected thereby.

In the case of Cooney v. Murdock, 54 Mo. 349, the defendant had obtained leave to file an answer in vacation, but instead of doing this he filed a demurrer, which on motion of the plaintiff was stricken out on the ground that it is the well settled rule of practice in that court not to permit a party defendant to file any pleading in vacation different in character from that for which leave was granted. Exceptions were taken to such ruling and the defendant immediately tendered his answer and offered to file the same, which the court refused to permit, and entered judgment for the plaintiff. From that judgment, after proper steps, the cause was appealed to the Supreme Court. In ruling the case, the court said, l. c. 350:

> "The trial courts undoubtedly have great latitude of discretion as to allowing or refusing permission to file pleadings out of time; and, unless that discretion be abused or unsoundly exercised, no case is made for the interference of this court. * * *

> "If, however, the answer had been preserved and had disclosed a meritorious defense, we should have held it an abusive exercise of discretion to have refused permission to file it, as it was already prepared, and no particular delay or hardship would have been occasioned by permitting it to be filed in term instead of vacation."

In the case of Reuck v. Strickland, 222 Mo. App. 1171, speaking of the right to file an answer out of time, the court said, l. c. 1174:

> "'Where, however, there occurs, as in the case at bar, a palpable abuse of that discretion, we cannot remain silent. Granting that the accidental misplacing of papers served on a party, is not of itself a sufficient excuse for failure to answer, although such party may be involved in extensive litigation, and the papers and writs served numerous; granting that the defendants were lacking in promptitude, still it does not thence follow that the action of the trial court was correct. For it should be the policy of courts to try causes on their merits whenever such a course will not result in hurtful delay. * * *'
>
> "While defendant's ignorance of the law and rules of court governing the filing of answers, is not a sufficient reason for failure to file answer, yet that circumstance coupled with a showing that defendant had a meritorious defense; that no harm had resulted from the delay and that defendant appeared and asked leave to file answer before any default judgment as taken, entitled him to a hearing of his case on the merits, and the action of the court in refusing such hearing was arbitrary and amounted to an abuse of discretion."

The court reversed and remanded the cause.

It will be seen from the above that for some purposes the courts construe the term "in vacation" to mean only that time between the final adjournment of the term and the first day of the succeeding term, while in other cases in construing other statutes and rights they define the term "in vacation" to mean a portion of the time which elapses between one setting of the court and a subsequent adjourned setting thereof.

For the purpose of the issuance of an order of publication, other things being regular, under the authority of Lumber Co. v. Keener, supra, the circuit court is in vacation when in recess beyond the day of recessing.

For the purpose of an unlawful detainer suit, it appears that the courts have construed the term "in vacation" to mean only that portion of time which elapses between the final adjournment day of the term and the first day of the next subsequent term.

It appears to be impossible for a general definition of the term "in vacation" to be expressed. It must be construed with reference to the particular matters and facts at hand at the immediate time.

With reference to the filing by litigants with the circuit clerk of papers in pending litigation, the clerk does not have authority to file them if they may be only legally filed by leave of court. With respect to papers which the litigant has the legal right to file without procuring an order of court, the clerk has authority to file the same when, if and as presented to him, and regardless of whether he writes his record that they are filed in vacation or in term time, the legal effect of the filing of such papers is the same. As was said by Judge Ellison in the case of State v. Derkum, supra,

> "But at whatever time an information may be filed, whether in term or in vacation, it is deposited with the clerk * * * and receives his endorsement of its filing * * *. The place of deposit is the same, and the clerk's idea of his receiving it in vacation or term time cannot alter the fact. His erroneous idea that the court was in vacation does not make it so."

The important thing is the physically handing to the clerk at his office the paper for filing. When it is so deposited with him and is a proper paper for filing absent leave of court, and is indorsed by him filed, it becomes a part of the court records and roll. If it is in the class of papers which he is not authorized to file absent an order of court, and he does so accept, indorse and file the same, such acts by him do not change the legal effect of the paper nor give it weight which the law theretofore had not authorized to be given unless and until the court granted leave so to file the same.

The meaning of the term "in term time" is, of course, the converse of the term "in vacation".

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

STATE BOARD OF CHARITIES: County Superintendent of Public Welfare is not authorized to administer direct relief.

February 5, 1936.

2-7

FILED
39

Mrs. W. W. Henderson,
Executive Director,
State Children's Bureau,
Carrollton, Missouri.

Dear Mrs. Henderson:

This will acknowledge receipt of your inquiry which is as follows:

> "Our Department of Child Welfare is in need of interpretation from you concerning Article 10, Chapter 125, 'Superintendent of Public Welfare in Certain Counties'. This information is necessary because our work is largely with superintendents of public welfare in rural counties and it has been our desire to strengthen that office and urge each county to appoint such an officer.
>
> "It has been our opinion that such a person in each county would handle the relief and such other duties as are designated in the above article, covering what we call the 'social welfare' of the county while the county court would be the business administrators.
>
> "Under the provisions of the Social Security Act as passed by congress, Missouri could qualify to secure its benefits for our dependent children if we strengthen the office of County Superintendent of Public Welfare.

"Many counties have a Probation Officer who is appointed by the Juvenile Judge or Circuit Judge and draws anywhere from $10 to $50 a month. In some of the counties they also have a Superintendent of County Welfare who draws from $50 to $100 a month. Our belief is that the two offices combined, with one salary, would enable the counties to secure the services of a good strong man or woman as Superintendent of Public Welfare.

"All this is leading up to the question I wish to ask of you and is brought about because of the newspaper reports of the opinion rendered by your office with respect to the situation in St. Louis County which desired to create a Department of Public Welfare.

"In the newspaper reports the statement is made that under present statutes the county court of St. Louis County has no authority to delegate its duties with respect to caring for the poor and that the county court must perform the duties prescribed by statute, in person, and cannot delegate these duties to other persons.

"Question 1. Does this opinion apply <u>only</u> to St. Louis County because it has a population of more than 50,000 and therefore would not come under Article 10, Chapter 125, R. S. 1929, because of the last paragraph of Section 14182?

"Question 2. Does Section 14184 give the County Superintendent of Public Welfare the right to administer direct relief to the poor, and if so did your opinion refer only to St. Louis and Jackson County, etc, where it said, 'The duties and power imposed upon the county court

> for the direct relief of the poor involve a trust and confidence, judgment and discretion, and these cannot be delegated'?
>
> "I have recently discussed with Mr. Jameson, President of the Eleemosynary Board which governs my department of Child Welfare, the advisability of this and the economy that might result to the counties if the office of Superintendent of Public Welfare in each county could be strengthened and developed into a real county office.
>
> "My department has just received from Washington the assignment to administer the Federal Child Welfare program in Missouri, and I should be glad to discuss in person with your assistant who studies the welfare provision of our statute, the status of Missouri whereby we can operate without much changing of our present laws, as I think it possible for us to do."

Replying thereto, Sections 12953 and 12954, R. S. Mo. 1929, are laws of general application and apply to the county courts of all the counties in Missouri. Section 12953 states that "the county court of each county" shall be governed by its provisions, and does not state that merely St. Louis County or some other county shall come within its operative effect.

The opinion dated December 23, 1935, from this department to Hon. John J. Wolfe, Associate Prosecuting Attorney, St. Louis County, Clayton, Missouri, a copy of which is enclosed, in construing said statute with reference to St. Louis County, applies with equal force to every other county in the state.

The above referred to opinion merely holds that where a certain duty is placed on the county court involving the exercise of its judgment, that body must exercise its own judgment instead of setting up a new and different board

or body with power in the latter to exercise its judgment in lieu of the county court, to whom the Legislature delegated such duty.

Section 14184, R. S. Mo. 1929, places the duty on the county superintendent of public welfare "to administer all of the funds of the county devoted to outdoor relief and allowances to needy mothers. He shall seek to discover any cases of neglect, dependent, defective or delinquent children in the county, and take all reasonable action in his power to secure for them the full benefit of the laws enacted for their benefit."

The same authority, to-wit, the Legislature, which conferred on the county court the power and duty to look after the poor, likewise placed on the county superintendent of public welfare the duties set forth above. Those duties, in the main, are not to look after the poor, but are to "administer all of the funds of the county devoted to outdoor relief" and allowances to needy mothers, and to seek to discover any cases of neglect, dependent, defective or delinquent children in the county and take action to secure for them the full benefit of the laws enacted for their benefit.

By Section 14182 that course is optional with the county, provided the population of the county is less than fifty thousand, but when such option is exercised by the county and the county superintendent of public welfare has been so appointed, he is authorized to perform the duties of probation and parole and attendance officers of the county, and also the duties of such officers for incorporated cities, towns and villages which have a population of over one thousand inhabitants, and his services therein are in lieu of the other probation, parole and attendance officers who would, absent his appointment, perform the duties of such officers.

The case of Poindexter v. County, 295 Mo. 629, 246 S. W. 38, holds that when the county has so appointed a county superintendent of public welfare, he thereupon becomes the probation officer of the juvenile division of the circuit court regardless of the provisions of Section 14171, which authorizes the circuit judge to designate or appoint a probation officer and deputy probation officers.

Section 14185 empowers the state board of charities and corrections to deputize such county welfare agent to perform on behalf of said state board of charities and correc-

tions, and as its agent, "any work to be done by said board within the county," and when so authorized he is clothed within the county with all the authority the state board of charities and corrections has, and he may at any time call on the state board of charities and corrections for advice and assistance. He has other specified duties to perform as set forth in Article 10, Chapter 125, R. S. Mo. 1929.

CONCLUSION

It is our opinion that the county superintendent of public welfare does not have the authority to administer direct relief to the poor as such, but does have authority to administer, under Section 14184, R. S. Mo. 1929, "all of the funds of the county devoted to outdoor relief and allowances to needy mothers," and that it is his duty to "seek to discover any cases of neglect, dependent, defective or delinquent children in the county and take all reasonable action in his power to secure for them the full benefit of the laws enacted for their benefit."

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

COUNTY TREASURER AND :) The incoming treasurer and ex officio
EX OFFICIO COLLECTOR :) collector must of necessity make up
the 1937 annual "delinquent land list."

November 21, 1936.

11-21

FILED
39

Mr. W. A. Heydenberk
c/o Tom Carlton
Treasurer and Ex-officio Collector
Barton County
Lamar, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "When a new treasurer is to take office April 1st, 1937, should he make the delinquent tax books or should the out-going treasurer make it, and if so, how is he to be paid?"

Barton County has a population of 14,560 inhabitants and has adopted township organization. Official Manual, State of Missouri, 1935-36.

In 1933 the Legislature, regular session, repealed Section 12130, R. S. Mo. 1929, and enacted in lieu thereof a new section known as Section 12130, Laws of Missouri, 1933, page 338, which in part provides as follows:

> "On the Tuesday after the first Monday in November, 1936, and every four years thereafter, there shall be elected by the qualified voters * * * in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the county court of his county * * * * Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

Section 12312, R. S. Mo. 1929, provides in part as follows:

> "The county treasurer of counties having adopted or which may hereafter adopt township organization shall be ex officio collector, and shall have the same power to collect all delinquent personal property taxes * * * * * the delinquent or non-resident lands or town lots, and to prosecute for and make sale thereof, the same that is now or may hereafter be vested in the county collectors under the general laws of this state. The ex officio collector shall, at the time of making his annual settlement in each year, deposit the tax books returned by the township collectors in the office of the county clerk, and within thirty days thereafter the clerk shall make, in a book to be called the 'back tax book,' a correct list, in numerical order, of all tracts of land and town lots which have been returned delinquent by said collectors, and return said list to the ex officio collector, taking his receipt therefor."

While Section 12312, supra, provides that the ex officio collector shall at the time of making his annual settlement deposit tax books returned by the township collectors in the office of the county clerk and requires the county clerk to make a back tax book, yet in view of the law enacted by the 1933 Legislature and known as the Jones-Munger law, we believe that part of Section 12312 that requires the county clerk to make up the back tax books to have been repealed because Section 9963c, Laws of Missouri, 1933, page 448, provides:

> "In all counties that have adopted or may hereafter adopt township organization, wherever the word 'collector' is used in this act, as to such counties such

> designation shall be construed to mean 'treasurer and ex-officio collector.'"

Section 9952, Laws of Missouri, 1933, page 429, specifically provides that the county collector shall make out and record the delinquent taxes. Said section reads in part as follows:

> "Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, * * * * *."

Prior to the enactment of the Jones-Munger law in 1933, the county clerk made up the back tax books but now that duty rests with the county collector. Thus, many provisions of the old statutes, read in the light of the Jones-Munger Act, reveal a conflict. The treasurer and ex officio collector makes an annual settlement the first Monday in March. Sections 12313 and 9918, R. S. Mo. 1929. The township collectors also make an annual and final settlement with the county court the first Monday in March. Section 12323, R. S. Mo. 1929. The Jones-Munger law, Section 9952, supra, requires the treasurer and ex officio collector, between the first of January and first of July to make out the "delinquent land list." As the Jones-Munger Act is the latest statute on the subject it would take precedence over the former statutes relating to making out and recording the "delinquent tax books."

Therefore, it resolves itself into the proposition that the outgoing treasurer and ex officio collector would not have the delinquent township tax books in his possession a sufficient length of time in which to comply with Section 9952, supra, prior to going out of office, due to the time fixed for settlement. Thus, as a matter of practical effect, the incoming treasurer and ex officio collector would have

to make and record the new and annual delinquent land lists for 1937, provided for in Section 9952, supra.

Section 9969, Laws of Missouri, 1933, p. 429, provides the fees for making and recording the list of delinquent lands and lots, and reads in part as follows:

> "To the county collector for recording the list of delinquent lands and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

From the above it is our opinion that the incoming treasurer and ex officio collector shall make the annual 1937 "delinquent land list." However, we do not wish to be understood in the premises because when the treasurer and ex officio collector makes his settlement he will have to present a list showing what taxes remain delinquent. But, as far as making the permanent "delinquent land list" for 1937, that duty would rest with the incoming treasurer and ex officio collector, because the outgoing treasurer and ex officio collector would not have the means in order to make it, due to the settlement being required in March of township collectors as well as treasurers and ex officio collectors. Sections 12313 and 12323, R. S. Mo. 1929.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH:EG

SCHOOLS: Use of school property for purposes other than instruction to pupils is discretionary with the Board of Directors

January 15, 1936.

1-15

FILED
40

Dr. Irl R. Hicks
President, Board of Education
School District of Wellston
6201 Lotus Avenue
St. Louis, Missouri

Dear Doctor:

This is to acknowledge your letter as follows:

"The School District of Wellston, Missouri, is confronted with a problem concerning the use of its school buildings which is gradually becoming alarming.

"Numerous organizations are applying for use of the School for activities that have no connection with the school, and although I have read Sec. 9205, and believe from it that it is apparently within the discretion of the School Board to determine the use of the buildings, yet, I wonder if there is not some further limitation of the law in this respect. For instance, in the section above referred to (9205), I find, 'as will not interfere with the prime purpose to which such buildings, etc. are devoted.' This, of course, is some limitation but has this ever been interpreted by the Courts?

"The direct question now at hand deals with a local Townsend Club whose demands (not requests), if granted, would interfere with social and other extra school

> functions, but not the regular school work. Does the quotation from the Statute above mean interference with the extra school functions, as well as the regular school work?"

Section 9269, R. S. Mo. 1929, provides in part as follows:

> "The title of all school house sites and other school property shall be vested in the district in which the same may be located; * * * * *"

While the title to all school sites is vested in the district, yet, Section 9205, R. S. Mo. 1929, provides as to the care and use of the schoolhouses and grounds. Said section provides in part as follows:

> "The board of directors or board of education shall have the care and keeping of all property belonging to the district, * * * * * The board shall keep the schoolhouses and other buildings in good repair, * * * * * The board of directors, or board of education, having charge of the schoolhouses, buildings and grounds appurtenant thereto, may allow the free use of such houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for such other civic, social and educational purposes as will not interfere with the prime purpose to which such houses, buildings and grounds are devoted: Provided, that at any annual or special meeting the use of the schoolhouse for any of the above purposes may by a majority vote of the qualified voters voting on the proposition be prohibited. Such prohibition shall remain in effect until

> the next annual school meeting. Whenever any such application shall be granted and the use of such houses, buildings or grounds shall be permitted for the purposes aforesaid, the board of directors, or board of education, having charge of the same may provide, free of charge, heat, light and janitor service therein when necessary, and may make such other provisions, free of charge, as may be needful for the convenient and comfortable use of such houses, buildings and grounds for such purposes, or said boards of directors, or boards of education, may require all such expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. All persons upon whose application, or at whose request, the use of any schoolhouse, building, or part thereof or any grounds appurtenant thereto, may be permitted as herein provided, shall be jointly and severally liable for any injury or damage thereto which directly results from such use, ordinary wear and tear excepted: Provided, however, this article shall not apply to cities which have or may hereafter have 75,000 inhabitants or more."

Section 9284, R. S. Mo. 1929, provides in part as follows:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast: * * * * *
>
> "Fifth--To determine, by majority vote, whether or not the schoolhouse of the district may be used during the ensuing year for religious, literary or other purposes, or for the meeting of farmer or labor organizations, secret or otherwise.
>
> * * * * * * "

A reading of the above sections shows that the title to schoolhouse sites is vested in the district in which same are located and that the board of directors of said district has imposed upon it the duty of caring for and keeping of all property. Provision is also made for the permitting of the use of said schoolhouse for various purposes when same will not interfere with the prime purpose to which the building is devoted.

The ultimate authority as to permitting the use of schoolhouses for purposes other than instruction of pupils between the ages of six and twenty years vests in the qualified voters of the district. However, the board of directors has a discretion in allowing or permitting the use of the schoolhouse, absent a vote, affirmative or negative, on the question by the voters. However, the board of directors cannot permit the use of the schoolhouse when such use interferes with the prime purpose for which the schoolhouse was devoted.

In your letter you state that a certain local club is demanding the right to use the schoolhouse, and please be advised that (absent an affirmative vote by the voters of the district) it is not mandatory upon the board of directors to grant any request unless said board desires to do so.

The prime purpose for which school sites and buildings are devoted is derived by virtue of the Constitution, namely, Article XI, Section 1, Constitution of Missouri, which provides as follows:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

Schoolhouses are primarily for one purpose and that is to provide gratuitous instruction for persons between the ages of six and twenty years. However, the Legislature recognizes

the right of the people of the district to the use of the schoolhouse when same is not being devoted for the purpose of giving gratuitious instruction.

From the above it is our opinion that, absent a vote on the part of the voters of the district, the board of directors has a discretion in the permitting the use of school property to other organizations or clubs or associations or persons when said schoolhouse is not being used for gratuitous instruction of persons between the ages of six and twenty years residing in said district. If the board of directors feels that the demands of the local club to use the schoolhouse will interfere with social and other extra school functions theretofore granted, then, in our opinion, said board of directors may refuse said local club the use of the school property if such be the desire and wish of said board. In other words, the board of directors has discretion to be exercised in permitting the use of the school property.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

GAME AND FISH CRIMES: (1) Territorial jurisdiction of crimes is limited to statutory and constitutional boundaries which change by "accretion" but not by "evulsion".
(2) Netting of fish in April and May in Missouri waters is a misdemeanor.

March 31, 1936.

4-2

FILED
41

Honorable Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We acknowledge your request for an opinion dated March 16, 1936. Your request reads as follows:

> "I would appreciate an opinion from you regarding the rights of commercial fishermen to use nets or seines in that portion of the Missouri River which forms the boundary between Missouri and Kansas, during the months of April and May. Sec. 8273 R. S. 1929. Particularly where the fishermen live in Missouri and have both a Missouri fishing license and a Kansas Commercial fishing license. Also if a fisherman living in Kansas and holding a Kansas Commercial fishing license would be violating the laws of Missouri by fishing in the Missouri river with nets or seines during April and May. Sec. 1, Art. 1 Const.
>
> "Also if the thread of the stream is ever used as a dividing line between the states for the purpose of determining jurisdiction of the respective states."

Section 8270 R. S. Mo. 1929, provides in part:

> "It shall be unlawful for any person or persons to take, catch, or kill, any fish in any of the waters of this state, my means of any trammel net, gill net, fish trap, firearm, rifle or gun or any other kind of net, trap, firearm, device or any other means other than by ordinary hook and line, gig, spear,

> trot line, artificial bait, or seine, of the kind and at the time, and in the manner permitted by law. * * * * A violation of the provisions of this section shall constitute a misdemeanor, for which the minimum fine shall be ten dollars ($10.00) for the first fish ilegally taken or possessed, and a fine of one dollar ($1.00) for each additional fish illegally taken or possessed."

Section 8273 R. S. Mo. 1929, provides in part:

> "The use of seines, hoop nets and trammel nets, is hereby permitted, in the Mississippi, Missouri and Osage rivers, during the months of January, February, March, June, July, August, September, October, November and December of each year, with seines and nets, the mesh of which shall not be less than two inches square;* * * *."

From the foregoing, the use of nets is prohibited in rivers within the jurisdiction of this State, excepting the use of same in the Mississippi, Missouri and Osage rivers during certain months. The months of April or May are not noted as months in which netting of fish is permitted. The force of the Statutes is not abated because one violating these provisions happens to have a Missouri State fishing license or a Kansas commercial fishing license. Fishermen are not licensed to violate the law. Where one violates these sections and fish in prohibited waters under the jurisdiction of the Missouri courts, he is subject to prosecution in Missouri.

In proceeding against one who has violated any game and fish law, it is necessary that the Court, before whom a proceeding be filed, have venue in the matter. Venue in such cases is limited to territorial meets and bounds of the township, the county, or the state, according to whether the criminal prodeeding be filed before a Justice of the Peace or direct in the Circuit Court. Section 3377 R. S. Mo. provides:

> "Offenses committed against the laws of this state shall be punished in the county in which the offense is

committed, except as may be otherwise provided by law."

Section 3414 R. S. Mo. 1929, provides:

"Justices of the peace shall have concurrent original jurisdiction with the circuit court, coextensive with their respective counties in all cases of misdemeanor, except in cities having courts exercising exclusive jurisdiction in criminal cases, or as otherwise provided by law: Provided, that all prosecutions before justices of the peace for misdemeanor shall be commenced and prosecuted in the township wherein the offense is alleged to have been committed: Provided further, that nothing herein contained shall prevent the defendant from taking a change of venue, as provided for in this article."

We are not familiar with the legal boundaries of the different townships in Buchanan County, but we know that their western boundary lines are contiguous to the western boundary line of Buchanan County, and of the State of Missouri. The boundary lines of Buchanan County may be found in Section 11895 R. S. Mo. 1929, which provides as follows:

"Beginning at a point in the middle of the main channel of the Missouri river, where the prolongation west of the line run and marked by M. M. Hughes, under the act of the general assembly of 1838 and 1839; thence east of said line to the old boundary line of the state; thence north with said line to the point where it is intersected by the subdivisional line between sections twenty-one and twenty-eight of township fifty-eight, range thirty-three, west; thence west with the subdivisional lines to the middle of the main channel of the Missouri river; thence down said river, in the middle of the main channel thereof, to the place of beginning."

Section 12005 R. S. Mo. 1929 provides:

> "Whenever a county is bounded by a watercourse, it shall be construed to the middle of the main channel thereof; and range, township and sectional lines shall be construed as conforming to the established surveys."

From the provisions of Section 11895 and 12005, supra, there can be no doubt but that the statutory boundary of Buchanan County and of the State of Missouri on the west was originally established as the middle of the main channel as the same existed at the time that these statutes became the law. These statutes were in force at the time of the adoption of the Constitution of 1875, the present Constitution.

Article IX, Section 1 of the Missouri Constitution provides:

> "The several counties of this State, as they now exist, are hereby recognized as legal subdivisions of the State."

In the case of State v. Hoffman, 318 Mo. 991, l. c. 994; 2 S. W. (2d) 582, the Supreme Court said:

> "Because of the constitutional and statutory provisions just mentioned the State in all of its contentions in this case has assumed that the boundary between the two counties has never varied a hair's breadth from where the middle of the channel of the river was in 1875, notwithstanding the channel had prior to 1915 gradually and imperceptibly shifted from that place far to the east and north. Under all the authorities the assumption is clearly wrong. For there is nothing in the language of either the statute or the Constitution to indicate that the framers in the one case or the Legislature in the other intended to alter or abolish the rules of the common law relating to running water as a

boundary. In dealing with questions touching such a boundary, the Supreme Court of the United States has uniformly applied those rules (which are the same as those of the civil law and the law of nations), whether the boundary was one fixed by treaty or by Act of Congress. * * * *

"For a statement of the rules referred to in the preceding paragraph we cannot do better than quote from the opinion of Mr. Justice Brewer in Nebraska v. Iowa, supra, at page 360:

"'It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions my vary. In New Orleans v. United States, 10 Pet. 662, 717, this court said: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." (Citing cases.)

"'It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel,

> although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." (Citing cases.)
>
> "'These propositions, which are universally recognized as correct where the boundaries of private property touch on streams are in like manner recognized where the boundaries between states or nations are, by prescription or treaty, found in running water. Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel.'"

CONCLUSION.

If, since the Constitution of 1875 the middle of the main channel of the Missouri river, bordering on and flowing through Buchanan County, Missouri, has changed its main channel by avulsion, then this department is of the opinion that under the Missouri Game and Fish Laws all persons who fish with nets in that portion which at the establishing of the Constitution of 1875 lay east of the main channel, bordering on and flowing through Buchanan County, Missouri, during the months of April and May, are guilty of a misdemeanor and are subject to the penalty provided in Section 8270, supra.

If, since the Constitution of 1875 the middle of the main channel of the Missouri River, bordering on Buchanan County, Missouri, has changed its main channel by accretion, then this department is of the opinion that the State, County and Township boundary line on the west has changed

contiguous with the channel, and under the Game and Fish Laws all persons who fish with nets in that portion of the river which is between the middle of the main channel and the terra firma of Buchanan County east of the main channel, during the months of April and May, are guilty of a misdemeanor and are subject to the penalty provided in section 8270, supra.

The State, County and Township boundary line follows any changes in the stream due to accretion, but remains in the middle of the 1875 channel in case of avulsion. It is common knowledge that the middle of the main channel, since the Constitution of 1875, has changed its course at this location and has moved to the east. No facts stated in your letter tell us whether this change was by accretion or by avulsion, hence this opinion covers both possibilities, and the law is applicable in either case.

Crimes and misdemeanors committed within the Constitutional and statutory bounds of Buchanan County have their venue in Buchanan County, or if a misdemeanor, in the township, irrespective of the present thread of the stream.

It is common knowledge that April and May are the spawning season when fish travel in schools. The Missouri Game and Fish Laws are for the protection of fish from those who would net schools of fish from the Missouri waters. The Legislature intended the conservation of fish life while they are breading. Kansas may not have such a conservation law, but on the other hand neither a Missouri nor a Kansas license is any protection to one who has violated the Game and Fish Laws of Missouri in Buchanan County, Missouri, and parts of Buchanan County, Missouri, at this time may be dry land west of the present main channel and thread of the stream, if since the Consitution of 1875 this channel change to the east came about by avulsion. It is altogether possible that the Missouri river flows through land located in Buchanan County, Missouri, at this time.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

COUNTY COLLECTOR AND
COUNTY TREASURER : Collector cannot pay taxes which he has collected to county treasurer by warrants unless such warrants were received from legal holder.

Treasurer not entitled to additional compensation for handling money derived from sale of road bonds.

July 16, 1936

7-20

FILED
41

Mr. W. A. Holloway
Chief Clerk
Office of State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office which reads as follows:

> "Conditions have arisen concerning the acceptance of county warrants by the county collector which necessitates this inquiry wherein we would like to know under what circumstances is the collector entitled to turn county warrants to the county treasurer. Can he turn over and receive credit for county warrants whether or not they were received in payment of tax? If the collector is only entitled to receive warrants in payment of the amount of tax due the county general revenue fund, what proof should he be required to give to the county treasurer that the warrant was properly used?
>
> "We would also like to know what compensation the county treasurer is entitled to for handling 'Good Roads Money' this Good Road Money derived from a bond issue."

I

Section 9911, Revised Statutes Missouri 1929, provides:

> "Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

It is plain from the above that a legal holder of a county warrant may use such warrant in payment of the county tax existing against such holder and accruing to the county issuing the warrant. However, such warrant cannot be received in payment of any tax unless it was issued during the year for which the tax was levied or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county for that year. It is also plain that the county collector must accept such warrants in lawful payment of a county tax and is entitled to receive credit for them in his settlement with the county treasurer. However, the above section does not authorize the county collector to

settle the amount of taxes collected by him and owing to the county by county warrants, unless such county warrants were actually collected in the payment of taxes from the legal holders thereof.

If a county collector should settle his accounts with the county treasurer by warrants which he has not collected from the legal holder thereof, in the lawful payment of the county tax, he would be guilty of speculating in county warrants and subject to prosecution under the provisions of Section 4094, Revised Statutes Missouri 1929, which said section reads as follows:

> Every clerk of a court of record, sheriff, marshal, constable, collector, of public revenue, or deupty of any such officer, or a judge of a county court, prosecuting attorney or county treasurer, who shall traffic for or purchase at less than the par value or speculate in any county warrant issued by order of the county court of his county, or in any claim or demand held against such county, shall be adjudged guilty of a misdemeanor, and shall, upon conviction, be punished by fine not less than twenty nor more than fifty dollars."

That a county collector may only pay the amount of taxes which he has collected and which are due the county by county warrants when he has actually received such warrants in the lawful payment of county taxes, is evident from the provisions of Section 12140, Revised Statutes Missouri 1929,which provides, in part:

> "Provided, however, that nothing herein contained shall prevent the treasurer from receiving from the collector all scrips and warrants lawfully received by him in the payment of county tax: Provided further, before the treasurer shall receive such scrips and warrants, the collector shall make out a list

> of such scrips and warrants, under oath, specifying the number and amount thereof, the date when received, and from whom received; and said list shall be filed and preserved by the treasurer."

In view of the above, it is the opinion of this department that a county collector cannot pay the taxes which he has collected and which are due the county to the county treasurer by county warrants, unless such warrants have been actually received by the collector in the lawful payment of a county tax, and that the county treasurer should not receive such warrants from the collector in payment of such tax until the collector makes out a list of the warrants, under oath, specifying the number and amount thereof, the date when received and from whom received.

II

We next answer your question as to what compensation the county treasurer is entitled for handling "Good Roads Money" which money is derived from a bond issue.

We assume that the good roads money about which you inquire was received by the county treasurer under the provisions of Sections 7957, 7958 and 7959, Revised Statutes Missouri 1929, which sections authorize the county courts to issue bonds for the construction, reconstruction or improvement of the public roads and bridges in their respective counties. Section 7959 provides that the proceeds of such bonds sold shall be paid into the county treasury and kept in a separate fund to be known as the 'Road Construction Fund.' The sections in question do not provide any special compensation for the services of the treasurer in handling this money.

Under the provisions of Section 12136, Revised Statutes Missouri 1929, it is made the duty of the county treasurer to receive all moneys payable into the county treasury and disburse the same on warrants drawn by order of the county court.

Under the provisions of Section 12138, Revised Statutes Missouri 1929, the compensation of the county treasurer for his services is fixed by the county court in such sum as they

may deem just and reasonable, unless otherwise provided by law. Said section reads:

> "Unless otherwise provided by law, the county court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

It is a fundamental principle of law that an officer is not entitled to compensation for performing duties imposed upon him by law, unless he can point to a statute authorizing such payment.

In the case of State ex rel. v. Adams 172 Mo. l. c. 7, it was said:

> "In order to maintain this proposition some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed.(Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220; Givens v. Daviess Co. 107 Mo. 603; Gammon v. Lafayette Co. 76 Mo. 675.)"

In view of the above, it is the opinion of this department that a county treasurer is not entitled to any additional compensation for the handling of money derived

from the sale of bonds issued by a county for the construction or improvement of public roads.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, jr.
(Acting) Attorney General

JET:LC

ELECTIONS: Challengers at primaries have no official rights beyond the territorial limits of the committeeman or committeewoman making the appointment.

FILED
41

July 31, 1936

Honorable Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated July 27, 1936, which reads:

> "I wonder if you could give us an opinion as to the interpretation to be placed upon section 10270 of the Revised Statutes of 1929.
>
> "The statute holds that 'the County, ward or township committeeman of each party in each county or the ward committeemen in any county with a population of over 300,000 may appoint two party agents or representatives', as challengers.
>
> "It seems to me that the interpretation of this section ought not to cause much trouble. The question has arisen in the County as to whether the ward or township committeeman alone can name challengers. It is my view that the committee woman has nothing whatever to do with naming challengers, and that the chairman of the County Committee cannot name challengers except in the township or ward in which he was elected.
>
> "I have no personal interest in this matter in any way, but I would like the opinion of your office so that we may have uniformity under the law in the coming election."

Section 10270 R. S. Mo. 1929, vests the power to appoint challengers in precinct polling places and provides:

> "The county, ward or township committeeman of each party in each county, or the ward committeeman in any city with a population of over 300,000, may appoint two party agents or representatives, with alternates for each, who may represent his party at the polling place in each precinct during the casting, canvass and return of the vote at a primary, who shall act as challengers and witnesses to the count of the vote for their respective parties, and have the power prescribed by law."

Section 652 R. S. Mo. 1929, provides:

> "When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included."

CONCLUSION

Pursuant to Section 10270, supra, we are of the opinion that the chairman of the County Committee has no power to appoint challengers in precinct polling places other than in the township or ward to which he was elected. The appointment of challengers give the challengers no power to witness or challenge the casting, canvassing or return of the vote in any polling place other than the polling places located in the township or ward of the committeeman making the appointment.

We are of the opinion that the committeewoman of any political party of a township or ward has equal

power to appoint challengers as the committeeman, that is, any township or ward committeewoman or committeeman can appoint two challengers with alternates.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

WOS:H

CONSTABLES: Fees of a constable and deputies for attending election and erecting and tearing down election booths

August 27, 1936 8-28

FILED 41

Mr. Lewis B. Hoff
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

We are in receipt of your request for an opinion which reads as follows:

> "I am submitting a statement of facts from which I would like to have the ruling of your office as to the fees a constable is entitled for his duties at election.
>
> "Linn township of this county has three voting precincts (two in Stockton and one in South Linn some seven miles distant). The constable appointed two deputies to assist him and erected the voting booths at each precinct the day before the primary. The day of the primary the deputies and constable attended the election, one to each precinct. The day after the primary the constable and his deputies removed and stored the booths.
>
> "The constable then presented his bill to the county court for his services itemized as follows: For services attending election $3.00; for parts of two days required in erecting the booths and taking them down, $6.00. This

made a total of $9.00. He then presented a bill to the county court for $3.00 per each deputy for attendance at the other two voting precincts in the township. This made an expenditure of $15.00 if both bills had been allowed.

"The question is what fee the constable is entitled to and what fees if any the deputies are entitled to. There were no court orders of any kind made in the case prior to the election and pertaining to this matter.

"I would be glad to have your opinion on this question."

Section 10201, Revised Statutes Missouri 1929, sets forth the duty of a constable to attend the election,

"The constable shall attend the elections in his township, and perform such duties as are enjoined on him by law, under the direction of the judges."

Section 11777, Revised Statutes Missouri 1929, provides for the payment therefor, where it states, in part, as follows:

"For each day or part thereof required in erecting the booths, taking them down, and attending any election in his township, when required to do so by the judges of election, per day, ... 3.00."

The right of a constable to appoint deputies is given by Section 11754, Revised Statutes Missouri 1929,

> "Every constable may appoint deputies who shall possess the same qualifications as the constable, who shall take the same oath of office and for whose conduct he shall be answerable, which appointment and oath shall be filed in the office of the clerk of the county court; said deputy or deputies, so appointed, shall devote his time to the duties of such office, * * * "

It is to be presumed at the outset that the constable in question was required by the judges to attend the election, as stated in Section 11777, supra. It is the well established rule in Missouri that officers are entitled only to those fees which are allowed by statute. The court, in State ex rel. Troll v. Brown 146 Mo. 401, said, l. c. 406;

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless tha statute gives it. When the statute fails to provide a fee for services he is required to perform as a public

> officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

That a constable is a public officer is set forth in State ex rel. Attorney General v. McKee 69 Mo. 504, where it is said:

> "The constable is not a city officer, he is a State officer. It is an office created by general law for every township in the State, and every ward in the city. He is a state officer in the same sense that sheriffs and clerks of courts of record are State officers, and that judges of inferior courts are State officers, although they can only discharge the duties of their respective offices, within a limited territory and not throughout the State."

As to the fees to which a deputy is entitled, in absence of statutes setting forth duties and payment therefor, e. g., allowance for guards in transporting prisoners, etc., there is no general statute which allows deputies any salary or fees.

The Supreme Court of Missouri, in Scott v. Endicott 38 S. W. (2d) 67, took cognizance of the usual procedure in which deputies are paid,where it said:

> "That being true, he is subject to the same general limitations as any other public officer in the matter of salary and fees. There is no provision in the law providing a salary for deputy sheriffs in counties such as Ozark County. It is perhaps

> common practice in some counties for the sheriff to pay his deputies a specified amount, but we are not herein concerned with the legality of such contracts."

The above case is in reference to deputy sheriffs, but the principle is equally applicable to deputy constables.

CONCLUSION

It is, therefore, the conclusion of this department that a constable is entitled only to those fees allowed by statute, and that any work done by deputies is included in these fees. Deputies, therefore, are not entitled to any payment for attendance at the polls when the constable also attends.

Respectfully submitted

Wm. ORR SAWYERS
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

AOK:LC
WOS

CRIMINAL LAW--CONCEALED WEAPONS: One traveling on a continuous journey peacefully through the State is not prohibited from carrying a concealed weapon.

August 29, 1936.

8-29 FILED 41

Honorable Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated August 24, 1936, which reads as follows:

> "As you have no doubt observed in the papers, we have been having a little controversy up here over a point of law. I would like to have an opinion from you upon the point at issue.
>
> "Briefly the facts are these: A man by the name of Harris came down here from Des Moines late one Thursday afternoon, he transacted one or two items of business around town, had a meal and then went over to his automobile. While in his automobile, he was approached by ten or twelve men who threatened him with violence. They climbed on the running-board of his car and shook it as though with an intent to tip it over. He had a gun in the side pocket of his car and in this situation he drew it out and warned the men to leave him alone. A warrant was asked for his arrest for carrying a concealed weapon and flourishing a deadly weapon. There is in my mind no question but what he had a right to flourish the weapon in view of the threats that were made and the violence offered. The question is whether he had the right to have the gun. Under the section 4029 of the statutes a traveler is exempt from the provisions of the concealed weapons law. I should like to have your opinion as to whether this man in these circum-

> stances was a traveler in contemplation of the law. Under the cases complied in Corpus Juris from other states a man does not lose his character as a traveler upon immediately arriving in town but is given time to transact his little business, to have a meal, etc., while in that character. There does not seem to be any Missouri cases that are in point."

Article II, Section 17, Missouri Constitution, provides:

> "That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summonéd, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons."

Section 4029, R. S. Mo. 1929, provides in part:

> "If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, * * * * or shall, in the presence of one or more persons, exhibit any such weapon in a rude, angry or threatening manner, * * * * he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment: Provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state."

The above statute was enacted in the Laws of 1909, p. 452. Prior to this enactment it was only a misdemeanor to carry concealed weapons or to flourish a deadly weapon.

Since enlarging the crime to a felony our Supreme Court has never construed the proviso relating to persons traveling continuously and peacefully through the State, but when the crime was but a misdemeanor the St. Louis Court of Appeals had this to say about said proviso in State v. Cousins 131 Mo. Ap. 617, l. c. 620:

> "Persons traveling peaceably through the State are, as a class, exempt from the provisions of section 1862, and with reference to it stand on the same footing as police officers, constables, sheriffs and their deputies, and as the exempting section has no qualifications, if defendant was traveling peaceably through the State, section 1862 does not apply to him."

It now becomes our purpose to apply the law laid down in the Cousins case. The facts in the Sousins case are not the same asthe facts outlined in your request. Let us look to the methods the Courts have used in construing facts under a Statute similar to the Missouri Statutes in determining criminal responsibilities.

Our neighbor, the State of Arkansas, had under consideration a statute exempting travelers from the mandates of their law relating to carrying concealed weapons, and in the case of Hathcote v. State 17 S. W. 721, l. c. 721; 55 Ark. 181, that Supreme Court said:

> "The statute prohibits the carrying of weapons, but excepts from its operation 'all persons when upon a journey.' The alleged error in the court's charge relates to what constitutes a journey within the meaning of the exception. In its original acceptation a journey was a day's travel, but in use it has attained a broader though less definite meaning. As generally understood it signifies travel to a distance from home, and it

> is not used in reference to travel in one's neighborhood or anong one's immediate acquaintances.
>
> "The statute intends to prohibit the practice of carrying weapons when unnecessary and harmful, but to tolerate it in particular cases as necessary to defense; and such necessity is supposed to exist to persons when on a journey. This implies that such persons are then exposed to probable perils from which otherwise they are exempt, and in defining its scope the exception should be as broad as the reason for it, but not broader. Persons traveling within the circle of their general acquaintance are supposed to be within its protection, and exempt from perils of the highway to which they are exposed when they pass beyond it. So, within the circle of their general acquaintance they are held not to be on a journey, while beyond it they are on a journey."

In the case of Kemp v. State 31 S. W. (2d) 652, l. c. 653; 116 Tex. Cr. 90, the Supreme Court of Texas reversing the case on grounds that the evidence showed the traveler within the exception, and said:

> "Nothing in the evidence seems to warrant any conclusion other than that the appellant was on a journey from Comanche county to the ranch in Runnels county where his mother was visiting for the purpose of taking her back to her home in Comanche county, and the evidence, in our judgment, does not show any such deflection or turning aside from his journey as would forfeit his exemption as a traveler. According to all of the evidence before the court, the appellant, at nightfall, simply turned aside and went to a restaurant to eat a meal, leaving his pistol in

> the car while he was eating. The officers who arrested him testified, but stated no circumstance which would reflect upon the good faith of the appellant in his claim that he was a traveler. The precedents upon the subject are numerous. Many of them are cited in Branch's Ann. Tex. P. C. Sec. 977. They are to the effect that the cessation of the journey on some legitimate business incident to the journey would not make the defendant caase to be a person traveling. See Price v. State, 34 Tex. Cr. R. 102, 29 S. W. 473, and numerous other cases cited in the note mentioned.
>
> "The evidence is not deemed such as to justify the conviction."

If your case were to be presented to the Supreme Court, the method of statutory construction applicable is well stated in State v. Bartley, 263 S. W. 95; 304 Mo. 58, l. c. 62:

> "Criminal statutes are to be construed strictly; liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication. Where one class of persons is designated as subject to it penalties, all others not mentioned are exonerated."

CONCLUSION.

This department is of the opinion that under the facts, as presented in your request, there has been no crime committed. Harris falls within the exception of the Missouri law relating to carrying concealed weapons, being a traveler in a continuous, peaceful journey through this State. The continuity of his journey was

not brought without the exception by his pausing to eat and sleep. He was still among strangers. The peacefulness of his journey was not brought to an end when he took his gun from the pocket of his car and warned threatening strangers to leave him alone. The Missouri Constitution gives the right to bear arms in defense of person or property.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

ELECTIONS:)
PRIMARY ELECTIONS:) Failure of County Clerk to publish notice, as required by Section 10256, R. S. 1929, of offices to be filled, does not invalidate primary or election.

June 6, 1936. 610

FILED
42

Mr. Will W. Horton, Secretary,
Democratic County Central Committee,
Poplar Bluff, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you requested the opinion of this department. You state in your letter that the "County Clerk of Butler County failed to comply with the Missouri election laws and did not publish a notice of primary election sent out by Secretary of State, Dwight H. Brown, until Saturday, May 16, and then only in one newspaper, the daily American Republic. He has ordered publication in one weekly on Thursday, May 21. As I understand the law, this notice should have been first published not less than ten days after he received it on April 21."

The two sections of the statute pertinent to your question are Sections 10255 and 10256, R. S. Mo. 1929, which are respectively, as follows:

(10255)
"At least ninety days before the time of holding such August primary the secretary of state shall prepare and transmit to each county clerk a notice, in writing, designating the office for which candidates are to be nominated at such primary."

(10256)
"Upon receipt of such notice, such county clerk shall, not less than ten days thereafter, publish so much thereof as may be applicable to his county, once each week, for four consecutive weeks,

> in at least two, and not to exceed four, newspapers of general circulation, published in said county."

The latter section gives notice to the voters stating the office for which candidates are to be nominated at the primary election held the first Tuesday of August in the even-numbered years, and also gives notice to those who might desire to file as candidates for offices designated in said notice.

The statutes in most cases require notices of elections to be published in some certain designated manner stating the time and place of said election, whether it be a general election or a special election. The effect of the failure to comply with statutes relative to notices of special elections is very different from the failure to publish notices of a general election, or ones fixed by statute at a definite time and place. While the notice in question is not a notice of an election, it partakes of some of the characteristics of same and is one of the steps to be taken in the selection of candidates for offices to be elected.

As to special elections, a failure to publish the required notice would in most instances invalidate the election, but such is not the case in general elections where the time and place same are to be held are fixed by the statutes.

The rule is announced in 9 R. C. L., pages 990-991:

> "It may be stated as a general principle that the calling of an election contemplates the giving of some notice. And it is universally the practice to direct by statute both the manner and the time of giving notice of all elections--those fixed at regularly recurring intervals as well as special elections called for a particular occasion. There is, however, a difference in the necessity for notice in the two classes of elections, and this difference has been recognized by the courts in passing upon questions

> arising from a failure to comply with the requirements of the law. As to general elections it has been well established that the fixing of the time for the election either by law or by the constitution is in itself notice which all electors must heed; and hence where an officer is charged with the duty of giving notice of such an election or with the issuing of a proclamation thereof, his failure to perfrom his duty will not invalidate the election."

Also in 20 Corpus Juris, Section 81, p. 96:

> "Where, as in the case of general elections, the time and place of holding the same are fixed by the law itself, statutory provisions as to notice are considered as merely directory inasmuch as electors are bound to take notice of the law, and hence, a general election held at the time and place appointed by law is not invalid because no further notice thereof was given."

The provisions of Section 10256, supra, direct that the County Clerk publish so much of that part of the matter certified to him by the Secretary of State as is applicable to his county. The provisions of this section are directory only and are made with a view to the proper, orderly and prompt conduct and the taking of the necessary steps toward the selection of candidates in the succeeding primary election. While it is the duty of the County Clerk to publish said notice as required by this section, yet, we do not believe that the dereliction or neglect of some officer or for any other reason a failure to publish said notice according to the statute, would invalidate or be fatal to the succeeding primary election. The primary election is fixed at a definite

date by the statutes, i. e., the first Tuesday in August in the even-numbered years, and the statutes require that a candidate desiring to have his name printed on the ticket must file his declaration of candidacy with the proper official sixty days before the primary election. The statute itself is sufficient notice of those facts.

It is, therefore, our opinion that this section of the statutes, i. e., 10256, supra, is directory, and that any failure of the Clerk to comply strictly with its terms would not have the effect of invalidating the primary election and would not affect candidates regularly nominated at said primary. The officers, however, should strictly follow the statutes and cause to be published all notices therein required.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

COUNTY BUDGET ACT: The deficit in Class 2 relating to payment of jurors by script under Sections 8767 and 8765 may be paid out of excess funds existing at the close of the fiscal year in any other class, or may be paid out of surplus existing after all current expenses are paid, or from delinquent taxes.

July 15, 1936

7-15 FILED 42

Honorable Ellis W. Howlett
Circuit Clerk
Charlestown, Missouri

Dear Sir:

This Department acknowledges receipt of your request for an opinion of July 2. Your letter contains the following facts:

> "In the Budget estimate for the year 1936 for Mississippi County we have a total of $9,975.00 set up for class two expenditures. In class two the set up for Petit and Grand Juries is $2500.00. The County clerk claims that there will be no surplus in any of the other subdivisions of class two. In accordance with Section 8765 R. S. Mo. 1929 I have issued jury script for the February term Petit Jury in the sum of $1083.55 and for the February term Grand Jury in the sum of $400.30 making a total of outstanding script issued against the $2500.00 set up of $1483.85. We have another term of Circuit Court during this month, being the regular July term, and the regular October term to come. After deducting the total script issued I now have only a balance of $1016.15 for the two terms of Court. I may possibly get by the July term without issuing script in excess of the budget alotment, but am certain that I can not get by both terms of Court.
>
> "Section 8765 R. S. Mo. 1929 reading as follows:-

'Upon the demand of such juror, the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the County treasury' in so far as I can see was not repealed by the Budget Law of 1933.

"The last paragraph of Section 8 on page 346 of the Laws of 1933 reads as follows:-

'Any order of the County Court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond.'

"Section 8767 R. S. Mo. 1929 states that scrip issued by the Circuit Clerk in accordance with Section 8765 shall be handled in the same manner and subject to the same rules as County warrants.

"In your opinion, would I or would I not be liable on my bond as Circuit Clerk if I issue jury scrip in excess of the $2500.00 set up in the budget. "

The purpose of the Budget Act is to promote economy and efficiency in the business of the county. It did not necessarily change the complete financial structure of the county; the chief and foremost purpose was to divide the finances of the county into five different classes, each class to receive a priority over the succeeding class and the main burden on the county court and the other officers is to sacredly preserve the priorities. This we think to have been in the minds of the legislators in enacting paragraph two of Section 8 quoted in your letter.

Section 22 repeals all laws or parts of laws and ex-

pressly sections 9874, 9985 and 9986 in so far as they conflict.

Sections 8765 and 8767, mentioned in your letter, are mentioned, approved and explained in the case of Scott v. Young 113 Mo. App. 46. We think there is no conflict between these sections and the new County Budget Act. Further, that the same were not repealed expressly or by implication.

Your question,in the last analysis, as to the effect of whether or not if you issue more script in the payment of jurors than you have funds in Class 2 of the Budget Act, are you liable on your official bond as mentioned in the second paragraph of Section 8, Laws of Missouri 1933, page 346. You state there will be no excess of funds in the other subdivisions of Class 2. Therefore, if there is a deficit it will have to be taken care of in some other manner. By way of suggestion, if, at the close of the fiscal year, there remains in any other class any surplus funds which will not be needed in Class 1, then we think such excess could be used for the deficit which you state will, in all probability, be in Class 2. We think that Sections 12167 and 12168, which refer to the transfer of county funds, are still operative and effective.

Under Section 4, page 343, it appears that the Legislature has anticipated such a condition as you present in listing the following:

> "Less outstanding warrants for preceding years as follows (List total by years)
>
> "Less all known lawful obligations against the county December 31,last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate)
>
> "Total unpaid obligations of the county on January 1st of current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue)."

However, we call your attention to the fact that such excess script or warrants should not, when totaled with all the

other expenditures, be more than the anticipated revenue for the current year, otherwise such excess would be invalid and violative of Section 12, Article X, of the Constitution of Missouri, which prohibits the county

> "to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters * * * *."

Pursuing the question further, and assuming that there will be no excess funds in any class, how can script issued by you in excess of the amount alloted in the budget be ultimately paid. Referring again to Section 4, under estimated receipts the county clerk is instructed to deduct ten per cent from the total amount of the anticipated or ordinary revenue, in order to arrive at the net amount estimated for purposes of the budget. This deduction is made for the purpose of taking into consideration delinquent taxes.

In the case of State ex rel. v. Johnson 162 Mo. 621, it was held as follows:

> "A county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible. On the contrary, the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years. (Overruling obiter dictum in State ex rel. v. Horstman, 149 Mo. 290.) "

Therefore, we are of the opinion that if no exeess

remains at the close of the fiscal year in any of the classes which might be used to take care of the deficit which you state will probably exist in Class 2, then the delinquent taxes or surplus from any source, after all other current expenses are paid, can be used to take care of said deficit.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

OWN:LC

INSPECTION OF GRAIN: Form used by firm for inspection for its own convenience and not impersonating Grain Inspection & Weighing Department, not violation of Sec. 13362, R.S. Mo. 1929.

October 12, 1936. 10-16

FILED
42

Mr. J.B. Hopper,
State Warehouse Commissioner,
317-326 Board of Trade Building,
Kansas City, Missouri.

Dear Sir:

This department is in receipt of your letter inquiring as to the possible criminal liability of certain grain inspections. Your letter is as follows:

> "This Department maintains at Sikeston, Missouri an established inspection point in charge of a government licensed grain inspector, who is an employee of this Department.
>
> "We find, however, that the Scott County Milling Company of Oran, Missouri has an inspector who is grading grain for the farmers of that vicinity and using as a certificate the form enclosed herewith. This is not in conflict with the regulations of the United States Grain Standards Act; however, we would like to have an opinion as to whether it is a conflict with Section 13362 of the Missouri Statutes governing inspection and weighing of grain.
>
> The inspection certificate being issued at Oran, Missouri, and our inspector being established at Sikeston, Missouri, may make of no effect Section 13362 of our State Law. However, we believe that similar services are being performed by this same man at Sikeston, Missouri, although we have at that particular point an established inspector, and if this is the case and possible of proof, would it be a violation of Section 13362?"

The Supreme Court of Missouri has never passed on Section 13362, R.S. Mo. 1929, which provides:

> "The inspection or grading of grain in this state, whether into or out of warehouses, elevators, or in cars, barges, wagons or sacks arriving at or shipped from points where state grain inspection is established, must be performed by such persons as may be duly appointed by the commissioner, sworn and have given bond under this article, and any person or persons who shall assume to act as an inspector of grain who has not been duly appointed by the commissioner, sworn and given bond under this article, shall be held to be an imposter, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail, and if in the City of St. Louis, in the city jail of said city, for not less than three months nor more than six months, or both such fine and imprisonment, at the discretion of the court, for every such offense so committed,"

nor have any prosecutions reached the Supreme Court which might be a guide to the interpretation of said section. Therefore, it devolves upon us to glean from the section such interpretation as was in the mind of the Legislature at the time the section was passed.

The first element is that the inspection must be made where State grain inspection is established; the second is that it must be performed by a duly authorized and appointed deputy commissioner and inspector; and third, as the statute denominates a person who attempts to inspect to be an imposter, said imposter must claim to be a duly appointed agent and assume to carry out the duties as imposed by the statutes relating to the inspection of grain--in other words, he must be holding himself out as an appointee of the Grain Inspection and Weighing Department of the State of Missouri.

The enclosed form entitled "Inspection Department - The Scott County Milling Company, Oran, Missouri" appears to be a form used in connection with a service which this company is rendering to customers. You will note in the lower left hand corner thereof the words "For office settlement only." Of course, the facts in each instance would govern largely and the question of criminal intent would also be involved.

We do not know, and we presume your department has not a complete report, as to whether or not the person in question is representing himself to be an employee of the Grain Inspection and Weighing Department of the State or Missouri or of the Federal Government, or in other words what his statements and actions are as they might bear on the question of criminal intent--that of being an imposter.

From the facts as presented by you, it is the opinion of this department that the action of the Scott County Milling Company in having an inspector grade grain for the farmers of that vicinity does not constitute a violation of Section 13362, R.S. Mo. 1929 as contemplated by that section; however, if there are any further facts or acts on the part of the person in question, which you desire to submit, please feel free to write us further.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

OWN:AH

OFFICERS: Illegal for State, County of municipal officer to accept or use pass issued by railroad company in consideration of such officer acting as local attorney.

January 18, 1936 1-23

FILED 43

Honorable Henry B. Hunt
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion , which reads as follows:

> "Since my appointment as Prosecuting Attorney of Atchison county to fill the vacancy caused by the death of the Honorable Lee Mullins on November 21, 1935, two matters have arisen concerning which I request your opinion, to-wit:
>
> "First: Is the prosecuting attorney permitted to submit to the county court his bill for reasonable and necessary expenses incurred in investigations and work incident to his office?
>
> "Is the county court permitted to pay such a bill when rendered?
>
> "Second: Since the year 1922, I have been the local attorney for the Chicago, Burlington & Quincy Railroad Company, and as such attorney, as a retainer fee, I have carried the Burlington Annual Railroad Pass.

> "Can I legally hold, carry and use such pass? while occupying the county office of prosecuting attorney?
>
> "As indicated, said pass is a retainer, and is not a FREE pass."

In reply to your first question we inclose a copy of an opinion given to Honorable George F. Addison, Prosecuting Attorney, Salem, Missouri, under date of October 29, 1933, same having been written by Franklin E. Reagan, Assistant Attorney General, and approved by Roy McKittrick, Attorney General.

In answer to your second question we first call attention to the applicable provisions of the Constitution and statutes. Section 24, Article XII, of the Constitution of the State of Missouri reads as follows:

> "No railroad or other transportation company shall grant free passes or tickets, or passes or tickets at a discount, to members of the General Assembly, or members of the Board of Equalization, or any State, or county, or municipal officers; and the acceptance of such pass or ticket, by a member of the General Assembly, or any such officer, shall be a forfeiture of his office."

Section 4360 Revised Statutes Missouri 1929 prohibits a railroad or other transportation company, from granting or issuing free passes or tickets, to state, county or municipal officers.

Section 4361 Revised Statutes Missouri 1929 makes it a misdemeanor for any officer or employee of a railroad or other transportation company to send or deliver any free passes or tickets to any state, county or municipal officer.

Section 4362 provides that any such officer who shall accept, use or travel on such free passes shall be deemed guilty of a misdemeanor, and,upon conviction thereof, shall forfeit his office. Said section reads:

> "Any member of the general assembly of the state of Missouri, or member of the state board of equalization, or any state, judicial, county or municipal officer, who shall accept, use or travel on any free passes or tickets, or passes or tickets at a discount, mentioned in the preceding sections, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars for each offense, and upon conviction thereof, forfeit his office, and if there be no provisions made by law for the removal of such officer by impeachment, the court trying the cause shall adjudge the defendant to have forfeited his office and declare the same vacant: Provided, that no court other than the circuit court or criminal court of record shall have power to adjudge any such office to be forfeited and vacant."

Section 4363, which is entitled "Three preceding sections construed," provides:

> "The meaning of the three preceding sections of this article shall not be so construed as to prevent any of the officers or persons named in said three preceding sections from buying, nor any of the persons named in said sections from selling, tickets to the officers or persons named in said sections at the same rate that they are sold to all other individuals or classes of individuals to which they may belong, using and traveling on the same."

Since the Legislature specifically provides that Sections 4360, 4361 and 4362 shall not be construed to pre-

vent public officers from buying, and railroads and other transportation companies and their employees from selling, tickets to such officers at the same rate they are sold to all other individuals, it is reasonable to suppose that they intended to prohibit the sale or issuance of tickets by railroads or other transportation companies to public officers, and the use of tickets by such officers, unless such tickets are sold to said officers at the same rate that they are sold to all other individuals.

In the case of Schulz v. Parker 175 N. W. 173, the facts were briefly as follows:

Chapter 112 of the Laws, 32nd General Assembly of Iowa, prohibiting any common carrier of passengers from issuing, furnishing or giving any free tickets or passes for the carriage or passage of any person within the State, and prohibiting any person from accepting or using any free ticket or pass, with certain exceptions. The words 'free ticket,' 'free pass,' and 'free transportation' are defined to include any ticket, pass, contract, permit or transportation issued, furnished or given to any person by any common carrier of passengers for any other consideration than money paid in the usual way at the rate, fare or charge open to all who desire to purchase. Plaintiff was issued a pass by the Illinois Central Railroad Company in pursuance to a contract whereby the plaintiff, as an attorney at law, agreed to act as local attorney for such company. Such contemplated services were occasional or casual rather than usual or general. The annual pass in question was to be received in full compensation for such prospective services. Plaintiff contended that his pass was not a 'free pass' and that the prohibition of the statute applied only to a free pass and not to a pass supported by any consideration.

The Supreme Court of Iowa, l. c. 176, in answer to plaintiff's contention, said:

> "It is further agreed at this point that a 'free pass' is a free pass, and that it is incapable of any other definition. The authorities cited by the appellant are not quite agreed as to what constitutes a free pass. In State v. Martyn, 82 Neb.225, 117 N. W. 719, 23 L. R. A. (N.S.) 217, 17 Ann. Cas.659, it was held that, where the services of a surgeon were rendered for $25 a month and an annual pass, the provision for the

pass was a mere evasion of the statute, and was a gratuity within the meaning of the statute. If one were to pay $1 for an annual pass over the line of a great railway system, it would not be a free pass in a literal sense as contended for by plaintiff. But a court might well construe it as such as being within the spirit of the statute; otherwise the statute would fall by the mere weight of its own words. It could be evaded with impunity in numberless ways, whereby its letter could be obeyed and its spirit violated. If for the nominal consideration of $1 we should substitute the substantial consideration of $100, the problem would still remain. Such a substantial consideration would conform to the letter of the act with less appearance of evasion, but it would still leave the act ineffective for want of compliance with its manifest spirit. This is perhaps a sufficient illustration to show the reasonableness of applying legislative interpretation to the terms used in the act. By this interpretation it was announced that the word 'free' was not used in a literal and absolute sense, but that it was used in a sense sufficiently broad to give effectiveness to the legislation. If the spirit of the statute could be deemed broader than its literal terms, used in a strictly technical sense, then it was appropriate by definition to broaden the literal term to the larger dimension. And that is all that we have here. The purpose and effect of the definition is to make known by appropriate expression the scope of the statute both in letter and spirit, and to render coincident such letter and spirit. Otherwise the law is slain by its own letter, and furnishes an apt illustration of the Scripture saying: 'The letter killeth but the spirit giveth life.' 2 Cor.iii,6. An exhaustive citation and review of authorities may be found in a note to State v. Martyn,82 Neb. 225, 117 N. W. 719, 23 L.R.A.(N.S) 217, 17 Ann. Cas. 659."

In the case of Coco v. Oden 143 La. 718, 8 A. L. R. 1. c. 681, the court defined 'free pass' as follows:

> "A free pass or discrimination in rates is one for which a full consideration is not given, and the transportation is not paid for in the usual way, at the usual time, and at tariff rates.
>
> " 'A"free pass" means the privilege of riding over' a railroad 'without payment of the customary fare.' Perkins v. New York C. R. Co. 24 N. Y. 196, 203, 82 Am. Dec. 281; Words & Phrases, p. 2967."

The fact that a public officer accepted a pass before the law went into effect prohibiting such acceptance, would not give such officer the right to make use of such pass after a law was enacted prohibiting the acceptance or use of such pass, neither would the fact that a pass was accepted by a person before he was a public officer give such person the right to use such pass after he becomes a public officer.

In the case of People v. Rathbone 145 N. Y. 1. c. 440, the court said:

> "The further point that the defendant cannot be subjected to the penal consequences of this constitutional provision is untenable; inasmuch as the public officer is prohibited from making use of a pass, as well as from receiving one. It is no answer to say that the appellant, having rightfully received a free pas for transportation over the railroad before the Constitution went into effect, cannot be prevented from using what is his property. It is doubtful whether it is to be regarded as property, in the true sense of the term. But that is of slight importance.

> As a privilege extended to him by the corporation, the People may say to him that, while holding from them his public office, he shall not make use of this privilege. The provision was designed for the benefit of the public and had no other object than to do away utterly with the power of corporations to influence any public officer in the performance of the duties of his office."

CONCLUSION

In view of the above, it is the opinion of this department that it is illegal for a state, county or municipal officer to accept or use a free pass from any railroad or transportation company, even though said pass is issued in consideration of such officer acting as local attorney for such company.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

Inclosure

COUNTY COURT: Cannot appropriate funds for a county farm organization when the same does not legally exist.

2-10

FILED 43

February 7, 1936

Honorable Henry B. Hunt
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

This department is in receipt of your letter of February 3, 1936, wherein you make the following inquiry:

> "The County Court of Atchison County, Missouri, has requested me to ask for an opinion from you upon the following matter of inquiry:
>
> "Atchison County does not have any farm organization composed of '. . . not less than 250 bona fide farmers. . . .' as contemplated by Sections 12616 and 12617, R. S. Missouri, 1929.
>
> "In view of said fact, can the County Court of said Atchison County, as an 'Emergency Measure,' make the appropriation to carry out the provisions of the Smith-Lever act of congress under Article 17, Chapter 87, Revised Statutes of Missouri, 1929?
>
> "We have been informed that there are about 68 counties in this state that are making such appropriations, without having farm organizations as contemplated by said sections.

"The said County Court is now in regular session, but, in order to have your opinion in the premises, it will adjourn over for a week in order to give you time to consider this query. We know you are swamped with requests for opinions, but if you can give this request your immediate attention, it will be much appreciated by said Court.

"Thanking you in the premises, I am."

Section 12616, Revised Statutes Missouri 1929, gives the county court power to appropriate for county farm organizations, as follows:

"For the purpose of promoting the public welfare by assisting in the general betterment of farm and home practices and conditions, the county court of any county is hereby authorized and empowered to appropriate out of the general funds of the county such sums as it may deem proper for the support of county farm organizations and to pay out such moneys under the conditions hereinafter specified."

Section 12617 refers to the organization and qualifications of the county organization, and is as follows:

"A county farm organization is hereby defined as a county organization, willing to co-operate with the university of Missouri college of agriculture in carrying out the provisions of the Smith-Lever act of congress approved May 8, 1914, composed of not less than 250 bona fide farmers, farm women or tenants, with an annual membership fee of not less than fifty cents per member fully

> paid up, its constitution and by-laws formally adopted and its officers elected and installed. Provided,that for the purposes of carrying out the provisions of the Smith-Lever act the term 'farm bureau' whenever used in this article shall be deemdd and construed to mean any county farm organization."

This question has never been tested before any court. The county farm bureaus and organizations and the constitutionality of the same are discussed in the case of Jasper County Farm Bureau v. Jasper County 286 S. W. 381. In approaching the constitutionality of the act, the court traces the differant steps in the organization in the following language: (382)

> "The act further provides that whenever a county farm bureau has been organized with the required number of members,with its membership dues fully paid up, its constitution and by-laws adopted, and its officers elected and installed, the county court shall be empowered and authorized to appropriate out of the general funds of the county such sums as the court may deem proper for the support of such organization."

You state in your letter that no bona fide county farm organizations exist. Evidently, no organization has attempted to comply with Section 12617, quoted supra, therefore, we conclude no legal county farm organization, nor in fact does a de facto organization of any kind, exist.

Section 12619 states that the funds shall be appropriated for the payment of salaries and necessary expenses of men and women connected with the organization. The question will arise as to whom should receive any appropriation that the county court might make and who would be legally entitled to disburse the funds. Further, Section 12623 contemplatss that the county court shall only make appropriations for a period of not less than three years nor more than four years. This alone, we think, would preclude any appropriation

by the county court. Finally, the question resolves itself into whether or not the county court can make a donation or voluntary contribution to an ass ciation or group with no legal entity or being? County courts are created by statute, their duties are purely statutory.

It was said in the case of Bayless v. Gibbs 251 Mo. 492,

> "County courts are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

Also, in the case of State ex rel. Major v. Patterson 229 Mo. 373,

> "Under the constitution, Article 6, Section 36, providing that a county court shall have jurisdiction to transact all county business and such other business as may be prescribed by law, county courts are denied any rights except those expressly conferred."

In the Case of Blades v. Hawkins 240 Mo. 187, county courts are given incidental powers in the following language:

> "While the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

CONCLUSION

For the reason and logic assigned in the foregoing opinion, we come to the conclusion that a county court can not legally appropriate funds for a county farm bureau organization which does not exist in law, as provided in Sections 12616 to 12623, inclusive, nor do we find any implied powers in any of the statutory provisions relating to duties of a county court to make such an appropriation.

Yours very truly,,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

OWN:LC

RECORDER: Recorder's fee for recording real estate deeds.

2-75

February 20, 1936.

FILED
43

Mr. Duffey J. Hudnall
Clerk of the Circuit Court
and Ex-Officio Recorder
Memphis, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 30, 1936, which reads as follows:

> "Will you please advise me as to the correct way to index the enclosed example of a "Sheriff's Deed in Partition," and the charge for indexing it.
>
> "Under Section 11804 Revised Statutes of Missouri 1929, a recorder is allowed a fee of 10¢ for making and preserving direct and inverted indexes to every book containing deeds affecting real estate.
>
> "If there are several grantors or grantees named in a deed or if the land concerned in the deed lies in several sections, the deed must be indexed several times. Is the recorder entitled to 10¢ for each of the indexes that must be made because of the aforesaid circumstances or does a fee of 10¢ cover charges for all of the indexes?"

Section 11804 R. S. Mo. 1929, reads in part as follows:

> "Recorders shall be allowed fees for their services as follows:
>
> "For recording every deed of instrument, for every hundred words. . . . . $ .10

> "In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate. * * * *"

CONCLUSION.

The fact that there are several grantors or grantees in a deed for real estate, and the fact that land described in a deed for real estate lies in several sections, necessitating the making of several index entries in several books by the Recorder, does not add to the statutory fee for such service.

It is fundamental that a fee, to be allowable to a public officer, must be provided for in the statutes.

The Legislature in Section 11804, supra, has provided a fee in addition to the recording fee of ten cents (10¢) for each one hundred (100) words of a deed, where the deed relates to real estate. Thus the Recorder can legally charge an additional ten cents (10¢) for recording such an instrument.

This means that, when the recorder is recording a real estate deed, he legally charges ten cents (10¢) for each one hundred (100) words, and, after arriving at the total, he adds ten cents (10¢) to the total; his fee is then computed by the grand total figure. The statutes allow the recorder to add ten cents (10¢) for each "instrument relating to real estate". The statute does not even hint that ten cents (10¢) can be added for each time a name or a section of land is indexed when recording a real estate deed.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.
WOS:H

(1)

STATE ELEEMOSYNARY INSTITUTIONS: If county court finds patient in state hospital has not sufficient property to keep said patient as a private patient, such finding is final; (2) Father not compelled by law to maintain son in state hospital but may reimburse county if he so desires; (3) County Court cannot pay members of County Old Age Assistance Board.

February 24, 1936.

FILED
43

Hon. Glen W. Huddleston,
Prosecuting Attorney,
Carroll County,
Carrollton, Missouri.

Dear Sir:

This department is in receipt of your letter of February 16 wherein you request an opinion on three questions, which we shall attempt to answer in the order presented.

I

"Does the County Court of a county have the power to send a patient to a state institution as a county patient, if the patient has some property but not sufficient property to keep him as a private patient in said institution for any length of time?"

Section 8653, R.S. Mo. 1929, relating to pay patients becoming county patients, provides:

"If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any patient in a state hospital has not estate sufficient to support him at the asylum. Upon receipt of such certificate by the superintendent, such person shall be a county patient of such county, and shall be supported by such county, as provided by this article in the cases of poor patients."

Section 8654, R.S. Mo. 1929 relates to county patients becoming pay patients, and is as follows:

> "If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate, under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be made out and paid and a bond shall be required and executed as in all other cases of pay patients; a and upon a failure thereof, after reasonable delay, the superintendent shall discharge such patient in the manner as provided in this article in case of poor persons."

Section 8653, supra contains the words "has not estate sufficient to support him at the asylum", while Section 8654, supra, contains the words "has sufficient estate to support and maintain him at the hospital".

Section 8664, R.S. Mo. 1929 construes the terms "insane poor" or "indigent insane" and is as follows:

> "The words 'insane' and 'lunatic', as used in this chapter, shall be construed as including every species of insanity or mental derangement. The terms 'insane poor' or 'indigent insane', when applied to a person without a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state from attachment and execution when owned by any person other than the head of a family; and the same words, when applied to a person having a family, shall mean one whose property of all kinds does not exceed, after payment of his debts and liabilities, that which is exempted by the laws of this state

> from attachment and execution when owned by the head of a family; Provided, that when the said words are applied to a married woman, her separate estate, if any, and that of her husband shall be estimated as aforesaid, and the total amount of both estates shall determine the question aforesaid, whether she be a 'poor' person or not, within the meaning of this chapter. A person with a family is one who has a wife and child, or either; county patients are those supported in a state hospital at the expense of the counties sending them; pay or private patients are those supported in the hospital by their family or friends, or from the proceeds of their own property. Every word in this chapter importing the masculine gender shall extend and be applied to females as well as males; and any word importing the singular number only, or the plural number only, may be applied to one person or thing as well as to several persons or things."

Thus, it will be noted that an insane patient has the same exemptions as are applied to persons claiming exemptions under executions and attachments.

The amount of property, or the sufficiency of the patient's estate, as mentioned in your letter, is a question of fact. If the patient has sufficient estate over and above the exemptions as construed by Sec. 8664, supra, we are of the opinion that such excess could be used until exhausted for the payment of such patient's maintenance at the state insane asylum. However, the finding of the county court will prevail, as was said in the case of The State ex rel. Yarnell v. The Cole County Court, 80 Mo., l.c. 82-83:

> "The circuit court ruled in favor of defendant, refused to make the writ peremptory, and from this action of the court the plaintiff has appealed, and assigns for error, among other things, the refusal of the court to receive in evidence the order of the county court of Cole County made in the matter of making McGirk a patient of Cole County in the State Lunatic Asylum,

which order is as follows: 'Ordered by the court that Z.T. McGirk become a county patient at the lunatic asylum from this date.' The date of the above order is August 30th, 1880. It was objected to on the ground that it was a nullity, because the statute was not complied with in making it.

"The statute authorizing a pay patient confined in the asylum to be made a county patient, provides as follows: 'If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate under seal setting forth that any patient in the asylum has not sufficient estate to support him at the asylum. Upon the receipt of such certificate by the superintendent, such person shall be a county patient of such county, and shall be supported by such county as provided in the cases of poor patients.' R.S. 1879, Sec. 4140. As this section conferred jurisdiction upon the county court over the subject matter, and invested it with full power to make a pay patient a county patient, the order made by the court and offered in evidence cannot be said to be a nullity. It may be irregular, but that does not make it void. It is the fact that the pay patient has not estate sufficient to support him at the asylum that authorizes the county court to make him a county patient, to be supported at the expense of the county; and we can indulge the presumption that the court found this fact to exist and based its order upon it. This order, if certified to the superintendent, would be as binding on the county as a certificate of the clerk stating that he had been ordered by the court to certify that such pay patient had not estate sufficient to support him.

"The fact that McGirk, then a citizen of Cole County, was placed in the lunatic asylum in July, 1880, as a pay patient, is not controvertible, and in no way dependent on the question whether his

> sanity at the inquest of lunacy was tried by six or twelve jurors. While such a question might affect the regularity of the action of the probate court in appointing a guardian, it cannot affect the fact that he was confined in the asylum as a pay patient, nor the fact that he was subsequently, by the order of the county court, made a county patient. We will, therefore, in the disposition of the case, consider the order as being sufficiently efficacious to make said McGirk a county patient of Cole County from the time it was made."

In view of the foregoing, it is the opinion of this department that if the county court finds a patient has not sufficient property to keep him as a private patient in a state hospital, such finding is final and conclusive.

II

> "Does the County Court of a county have the power to send a person just over the age of 21 to a state institution as a county patient if the person has no money, or estate in his own name, but the person's father does have sufficient money to keep the person in the state institution as a private patient and does pay the county for the amount expended by the county on the person as a county patient?"

A father is not compelled by law to maintain a son in a state hospital; hence, by reimbursing the county for its expenditures for the maintenance of the patient, it inures to the gain of the county financially. An opinion covering this question was rendered by this department on October 29, 1935 to Honorable W. Ed Jameson, President of the Board of Managers of the State Eleemosynary Institutions, copy of which is enclosed. We believe this opinion properly answers your question.

III

"Can a county court legally pay the members of the County Old Age Assistance Board if it wants to, regardless of the provision in the Old Age Assistance Law to the effect that the County Board shall serve without compensation?"

On January 28, 1936 this department rendered an opinion to the Honorable G. Logan Marr, Prosecuting Attorney of Morgan County, Versailles, Mo. in which the question of compensating members of the County Old Age Assistance Board is discussed. A copy of said opinion is enclosed herewith, which we believe properly answers your question.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH
Encl2

TOWNSHIP OFFICERS: Increased compensation under Section 12310, R. S. 1929, as amended Laws of Mo. 1931, page 377.

5/21

May 23, 1936.

FILED
43

Hon. Glen W. Huddleston
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Mr. Huddleston:

This is to acknowledge your request for an opinion, dated May 19, 1936, which request is as follows:

> "Please send me an opinion as to the law in application to the following facts:
>
> "The township board of Dewitt township, Carroll County, Missouri, was informed this year as to the change in compensation for members of the township board under Sec. 12310, Laws of Missouri, 1931. After they received this information, the board allowed all members of the board $1.00 for each meeting of the board after the statute was changed, calculating from the time the term of office had ended during which the change was made up to the present time. The board members had only received $1.50 for each meeting during this period of time, for which the extra $1.00 was allowed.
>
> "The clerk of the board has received the extra $1.00 for each meeting, but is now asking the board to pay him the fees of 10 cents for filing and recording instruments, for the same period of time that

the extra $1.00 was allowed, under Sec. 12310, Laws of Missouri, 1931. The Clerk has never received any fees for the recording and filing of instruments during this time for which he claims.

"The board wishes to know if it is legal for them to allow the clerk these fees for this period of time?"

The Fifty-sixth General Assembly, at page 377, Laws of Missouri, 1931, repealed Section 12310, Revised Statutes of Missouri, 1929, and enacted in lieu thereof a new section. The following changes were made in Section 12310, R. S. Mo. 1929:

In the sixth line the word "one" was changed to "two," in the fourteenth line after "words" and before the semicolon the words "and figures" were added, and also in the sixteenth line the words "and figures" were added after "words" and before the comma.

The new statute became effective September 14, 1931, ninety days after the adjournment of the General Assembly. By the new section the per diem of the officers in counties under township organizations named therein were increased from $1.50 to $2.50 per day and the officers would receive said increase from said last named date. The clerk is entitled to this extra $1.00 per day as well as other named township officers. That part of Section 12310, supra, pertaining to the fees of the township clerk in the first proviso was not changed, except the words "and figures" were added at the places indicated above.

It is, therefore, our opinion that the township clerk is entitled to receive payment from the township the fees allowed by the newly enacted statute, from September 14, 1931, as well as before saiddate, for filing any instrument of writing and for recording any order or instrument of writing and for recording any order or instrument of

writing authorized by law, ten cents for every hundred words and figures, notwithstanding the fact that he has been paid the $2.50 per diem as allowed by Laws of Missouri, 1931 at page 377.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

MARRIAGE: Marriage between a man and his niece, although valid in Austria where contracted, is void in the State of Missouri and the parties are subject to criminal prosecution if they return to live as husband and wife in Kansas City, Mo.

9-8

September 5, 1936.

FILED
43

Honorable Cordell Hull,
Secretary of State,
Washington, D.C.

Dear Mr. Secretary:

This department is in receipt of your letter of August 29, 1936, to the Honorable Guy B. Park, Governor of the State of Missouri, requesting an opinion as to the following:

> "The Department has before it for consideration the case of an American citizen, a resident of Kansas City, Missouri, who proceeded to Vienna, Austria, and there was lawfully married to his sister's daughter, whom he now desires to bring into the United States as his wife in order that they may cohabit in the State of Missouri.
>
> "I should like to be advised whether such a marriage between an uncle and his niece would be recognized as valid in the State of Missouri. If the marriage should be recognized as valid in Missouri, it may be presumed that the parties thereto may lawfully cohabit in the State. On the other hand, if the marriage should not be recognized as valid in Missouri, would the parties thereto be subject to imprisonment in Missouri for incestuous cohabitation as unmarried persons, or as persons whose marriage is invalid in Missouri?"

Section 2974, Revised Statutes of Missouri, 1929, provides:

> "All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and negroes or white persons and Mongolians, and between persons either of whom is insane, mentally imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void; and it shall be unlawful for any city, county or state official having authority to issue marriage licenses to issue such marriage licenses to the persons heretofore designated, and any such official who shall issue such licenses to the persons aforesaid knowing such persons to be within the prohibition of this section shall be deemed guilty of a misdemeanor; and this prohibition shall apply to persons born out of lawful wedlock as well as those in lawful wedlock."

It may thus be seen that by reason of this section of our laws, a marriage contract between an uncle and his niece is absolutely void. The policy of this State, as declared by the legislative enactment, specifically prohibits such marriages, and any violation of said statute would subject the guilty parties to imprisonment in the state penitentiary, as provided in Section 4261, Revised Statutes of Missouri, 1929, which provides:

> "Persons within the following degrees of consanguinity, to-wit, parents and children, including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews, who shall intermarry with each other, or who shall commit adultery or fornication with each

> other, or who shall lewdly and lasciviously cohabit with each other, shall be adjudged guilty of incest, and be punished by imprisonment in the penitentiary not exceeding seven years."

Since the marriage between an uncle and his niece contracted in Missouri would be absolutely void, the question remaining for discussion is as to the validity of such a marriage contracted in Austria and valid according to the laws of Austria. In the first place, it is the general rule that the validity of a marriage is determined by the law of the place where it was contracted. If valid there, it is valid everywhere. However, the courts of this land have held a general exception to this rule in the case of marriages repugnant to the public policy of the domicile of the parties. As for an example, an incestuous marriage contrary to the positive laws of the state of domicile. 33 C.J. 1276.

Before proceeding further, we wish to refer briefly to the case of Fensterwald v. Burke, 129 Md. 131, 3 A.L.R. 1562. In that case it was held that the union of uncle and niece was not one of the relationships which is regarded by the general opinion of Christendom as so offensive that the court of the domicile would refuse to recognize the status if the contract was made at a place where the marriage was valid. We have studied this opinion and decline to follow its authority, as the law in that case declared is, in our opinion, unsound and we prefer to base our opinion on later decisions to which we shall presently refer.

Perhaps the leading case on the subject of incest is the case of Brook v. Brook, 9 H.L. Cas. 193. In that case Brook and a sister of his deceased wife, both domiciled in England, went to Denmark where they went through the ceremony of marriage. The Danish law permitted the marriage. The English statute had expressly declared that marriages between those related by affinity were forbidden by the law of God in exactly the same order as relationships by consanguinity, and by that law, therefore, Brooks' second wife was regarded as his sister (Beale, Vol. II, Conflict of Laws). The Lord Chancellor, Lord Campbell, said:

> "If the contract of marriage is * * * contrary to the law of the country of domicile, it is to be regarded as void * * * though not contrary to the law of the country in which it was celebrated. * * * It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary

> visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to the religion or morality, or to any of its fundamental institutions."

A somewhat analogous question is presented in the case of People v. Kay, 252 N.Y.S. 518. In that case, Mary Kay instituted divorce proceedings against one Colonel Reigelman in the St. Peterburg Consistory. The divorce proceedings, however, were never completed and the marriage between the parties never dissolved. Later, Mary Kay married Constantine Kay in Turkey. The Court, in holding this second marriage to be a nullity, said:

> "The Riegelman marriage subsisted and was valid in 1922, when the parties herein attempted marriage in Turkey. Polyandry is not recognized by Turkish law, and hence this complainant could not have been wedded to this defendant. But even assuming this marriage might have been valid in Turkey, we cannot accept its validity in this jurisdiction. The doctrine of comity must yield to the positive law of the land. Foreign law will not be given effect when to do so would be contrary to the settled public policy of the Forum. Marshall v. Sherman, 148 N.Y. 9, 42 N.E. 419, 34 L.R.A. 757, 51 Am. St. Rep. 654.
>
> "Marriages consummated in foreign countries which are within prohibited limits of consanguinity must therefore be held invalid in domestic jurisdiction.
>
> "The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there, it will be held valid everywhere, and conversely, if invalid by the lex loci contractus, it will be held invalid wherever the question might arise. 38 C.J. 1276. Where, however, the marriage in question

> is repugnant to the public policy in respect of polyandry, incest, miscegenation, polygamy, or contrary to its positive laws, the general rules will not apply."

The Supreme Court of the United States in the case of Loughran v. Loughran, 78 L. Ed. 1219, recognizes the exception with respect to incest, to the rule that a marriage valid in the lex loci contractus is valid everywhere, and said:

> "Marriages not polygamous or incestuous or otherwise declared void by statute will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction."

Our Supreme Court, in the case of Henderson v. Henderson, 265 Mo. 718, l.c. 732, said:

> "The view to which we here lend our concurrence is likewise approved in Ruling Case Law, wherein the rule is thus stated:
>
> 'There are expressions in the opinions in some of the cases which seem to favor the very questionable doctrine that, while the lex loci governs with respect to matters affecting the manner or mode of solemnization of the marriage and the preliminaries thereof, the question of matrimonial capacity is to be determined by the lex domicilii; and some of the decisions seem to be the result of the application of that doctrine. This is particularly true in the case of the English decisions. But most of these cases can readily be classified into one of the two well recognized exceptions to the general rule--first, marriages which are polygamous, or which are incestuous according to the general view of Christendom; and secondly, marriages which the local lawmaking power has declared shall not be allowed any validity.

> By the first exception the Christian standard of marriage is applied to every marriage, wherever celebrated and without reference to the domicile of the parties at the time of its celebration. If the marriage falls below this standard, it will be held void although it may be valid according to the lex loci and lex domicillii. In regard to the second exception the legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed or between parties who left the state of domicile for the purpose of avoiding its statute, when they come or return to the state; and some of the states have in terms legislated on the subject * * * ."

In conclusion, we refer to the case of Incuria v. Incuria, 280 N.Y.S. 716, wherein the question was presented to the Court as to the validity of a marriage between aunt and nephew. The Court said:

> "Since the marriage of the parties before me was not consummated in any of the states in the Union, the question arises whether or not the marriage, were it legal in the Kingdom of Italy, should be recognized by us in this jurisdiction.
>
> * * * *
>
> "If a citizen of a foreign state, in which state polygamy is legal, would bring his half dozen or so legal wives to our country, the marriage of the six spouses to the one spouse would not be considered legal or valid by us. The reason for that is that there is a positive

law against polygamy. Equally so, there is a positive law against marriage between nephew and aunt. Is the latter less positive than the former? Is the latter more to be condemned than the former? Either is as bad as the other."

CONCLUSION

The laws of the State of Missouri specifically prohibit a marriage between an uncle and niece and declare all such marriages entirely void. This prohibition was enacted for the benefit of the public health and the perpetuation of the human race. Incestuous marriages in Missouri are crimes, and it is our opinion that a marriage between a man and his niece, though valid where contracted--in this case, Austria--is nevertheless void in the State of Missouri, and if the parties in question return to the State of Missouri and live as husband and wife, they are subject to imprisonment under Section 4261, Revised Statutes of Missouri, 1929.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

GAME & FISH - Treapassing: In attempting prosecution under Sec. 8312, R.S. 1929, use of land and custom of owner regarding same should be considered. If either of three elements - "enclosed, improved or cultivated" - exist, prosecution will lie.

October 13, 1936. 10-15

FILED
43

Honorable Theodore P. Hukriede,
Prosecuting Attorney,
Franklin County,
Union, Mo.

Dear Sir:

This department is in receipt of your letter of October 1 relative to Section 8312, R.S. Mo. 1929, which letter is as follows:

> "I have four cases arising under the above section, in which the question arises as to the phrase 'Upon the enclosed, improved or cultivated lands of another.'
>
> "The situation is this: Four hunters parked their automobile on a public road and walked into a field which was improved, but there was no division fence between the field and public road, and I would like to have an opinion as to whether or not it would be necessary for these fields to be enclosed in order that a prosecution could be instituted under this section."

The Section in controversy, 8312, R.S. Mo. 1929, provides:

> "Every person who shall be found hunting, with gun or dog, upon the enclosed, improved or cultivated lands of another, or shall enter the same to catch or kill game of any kind, without the consent of the owner or person

> in charge of such lands, shall, on complaint of such owner or person in charge of such lands, and upon conviction therefor, be fined not exceeding ten dollars."

Evidently, the purpose of the section, by including the words "enclosed, improved or cultivated lands" must be special in nature in that what is commonly called "commons - barren and waste land" in Missouri is unprotected. This statute is given such an interpretation in the case of McKee v. Gratz, 260 U.S. l.c. 170, as follows:

> "But it cannot be said, as matter of law, that those who took the mussels were trespassers, or even wrongdoers, in appropriating the shells. The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of uninclosed and uncultivated land in many parts, at least, of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country. Marsh v. Colby, 39 Mich. 626, 33 Am. Rep. 439. In Missouri the implication is fortified by the limit of statutory prohibitions to inclosed and cultivated land and private ponds. Rev. Stat. 1919, Secs. 5662, 3654. There was evidence that the practice had prevailed in this region. Whether those who took these mussels were entitled to rely upon it, and whether, if entitled to rely upon it for occasional uses, they could do so to the extent of the considerable and systematic work that was done, were questions for the jury. They could not be disposed of by the court. The implication of a license of the kind that we have mentioned from the general understanding and

> practice does not encounter the difficulties that have been suggested in implying a license from conduct alone in cases where the same conduct after twenty years might generate an easement, it being a plain contradiction to imply ad interim a license which would prevent the acquisition of a prescriptive right. Chenery v. Fitchburg, 35 N.E. 554."

The term "enclosed land" implies that the same should be enclosed by a fence of some nature. In the case of Kimball v. Carter, 95 Va. 77, 27 S.E. 823, "inclosed land" is defined as follows:

> "'Inclosed,' when applied to lands, as defined by Webster, is 'separated from common grounds by a fence.' Worcester defines it as 'parted off or shut in by a fence.'"

"Improved land" is referred to in the following manner in the case of People v. O'Brien, 60 Mich. 8, 26 N.W. 795:

> "The term 'improved land' as used in How. Ann. St. Sec.9174, which provides for the punishment of every person who shall willfully commit any trespass by entering on the garden, orchard, or other improved land of another, without the permission of the owner thereof, and with intent, etc. does not include that portion of a farm lying within the limits of a highway."

In the case of Wiggin v. Baptist Soc., 43 N.H. 260, the Court said:

> "'Improved', as used in Rev. St. c. 136, Sec. 9, authorizing the owner of land, who shall have improved the same and erected a division fence, to recover of the adjoining owner the value of

> such part of the fence as it was his duty to build, means land which is used in any way or for any purpose, or occupied by buildings."

The real question in your letter, if we understand it correctly, is as to whether or not the land in question must be enclosed, improved or cultivated lands of another in order to successfully prosecute a charge under the statute, or if any one of the three conditions exist instead of all collectively whether a charge can be successfully prosecuted under this statute.

The general rule with reference to the conjunction "or" used in a criminal statute is stated in the case of State v. Nicholson, 43 Atl. 251, as follows:

> "As used in Rev. Code 1893, p. 944, providing that it shall be unlawful, without first having obtained the consent of the owner or legal proprietor, to take possession of, use, ride off, 'or' drive off a horse, 'or' is disjunctive, and distinguishes between riding off and driving off."

In the case of State v. McDonald, 4 Port. 449, the word "or" is interpreted as follows:

> "The word 'or', being used in a statute providing that if any free person shall be aiding or assisting, or in any wise concerned with any slave or slaves, in any actual or meditated rebellion, or conspiracy, or shall in any manner, devise, plot or consult with any slave or slaves, for the purpose of inciting insurrection, shall be punished, etc. The statute is to be construed as creating separate offenses, and therefore to 'advise' is one offense, to 'plot' another, to 'consult' a third, if done for the purpose of encouraging or exciting, or aiding or assisting."

"Or" generally indicates an alternative, as was said in the case of Shepard v. City of New Orleans, 25 So. 542:

> "'Or' generally indicates an alternative, corresponding to 'either', as 'either' this or that; that is to say, either one thing or another thing. Thus, in a city charter authorizing the granting of licenses to barrooms on written consent of the bona fide householders 'or' property holders within 300 feet, 'or' means 'either'."

In the case of Miller v. Gerk, 27 S.W. (2d) 444, the Court said:

> "Generally, two or more forbidden acts, disjunctively specified in statute providing for single punishment, may be charged conjunctively in one count, if committed in one transaction and not repugnant or inconsistent, nor wholly separate and distinct in nature."

In the case of State v. McCollum, 44 Mo. 343, the general rule is thus stated:

> "When a statute forbids several things in the alternative, it is to be construed as creating but one offense, and an indictment may charge the defendant with the commission of all the acts, using the conjunction "and" wherein the statute used the disjunctive 'or'"

CONCLUSION

It is the opinion of this department that if the land in question be enclosed and the same is trespassed upon as set forth in Section 8312, supra, then it would not be necessary that it be improved or cultivated and vice versa. However, you

state in your letter that the land is not enclosed. Therefore, if it is improved and you can show the same by facts, then a prosecution would lie; likewise, if the land is cultivated. We are of the opinion that proof of any one of the three alternatives would be sufficient to maintain the prosecution.

Regarding the information, we think it could be prepared in two counts, the first count charging trespassing upon improved land and the second count charging trespassing upon cultivated land; however, you are in possession of the facts and know which character of land the evidence would show. It is also possible to file one information charging all three of the alternatives in one count or information.

As stated in the case of McKee v. Gratz, supra, another element would be the question of whether or not the owner or person in charge supervises the land in such a manner that the general public has not been allowed to wander, shoot and fish at will--in other words, the general attitude of the public toward the land in question would be a factor in determining whether you could successfully prosecute under this section.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

OWN:AH

PENITENTIARY: Officers and employees of the Missouri State Penitentiary, and superintendents of institutions under department of penal institutions are not entitled to subsistence.

December 30, 1936.

2/1

FILED
43

Hon. S. B. Hunter,
Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

This department acknowledges your request for an opinion under date of December 19th as follows:

> "From the investigation that has been going on and some of the questions asked, the Board is constrained to believe it should have a written opinion from you regarding the whole question of subsistence:-
>
> "1. Who is entitled to subsistence at the Penitentiary?
>
> "2. Does the Board have the right to allow subsistence to the superintendents of the several penal institutions?
>
> "The present Penal Board, finding no statutes prohibiting the allowance of subsistence, has approved subsistence want lists submitted by the superintendents of the penal institutions.
>
> "It will be appreciated if you will go into this matter at your earliest opportunity and furnish the Board an opinion."

I.

Officers and employees of Missouri State Penitentiary are not entitled to any subsistence.

Laws of Missouri, 1933, Section 8319, page 328, provides the compensation of the Director, and members of the department of penal institutions, as follows:

> "The director of penal institutions shall receive an annual salary of not more than thirty-six hundred dollars, and such railroad fare and other traveling expenses as may be incurred while traveling in the discharge of official duty. Each member of the commission of the department of penal institutions other than the chairman thereof, shall have and receive an annual salary of not more than thirty-two hundred dollars, and in addition thereto shall be reimbursed for all railroad fare and other expenses incurred while traveling in the discharge of official duty."

Laws of Missouri, 1931, Section 8391, page 284, provides the compensation of the Warden of the penitentiary, as follows:

> "It shall be the duty of the commission of the department of penal institutions, by and with the consent and approval of the governor, to appoint a warden of the Missouri state penitentiary at an annual salary not in excess of three thousand dollars, and a physician of said institution at an annual salary not in excess of four (five) thousand dollars, said salaries to be paid in equal monthly installments as the salaries of other employes of the Missouri state penitentiary are now required by law to be paid. ****

Section 8394, R. S. Mo. 1929, provides the compensation of the Assistant Warden, and other penitentiary employees, as follows:

> "Said board shall have power to appoint one deputy warden, two chaplains and one matron ****. The board shall also appoint such number of turnkeys, guards and other assistants as may be necessary, who shall at all times be subject to its orders as may be required of them. The deputy warden shall receive for his services the sum of twenty-five hundred dollars per annum, and shall reside in a house provided as his official residence; the matron shall receive for her services the sum of ten hundred twenty dollars per annum. All

> turnkeys and guards shall receive for their services the sum of one hundred thirty-five dollars per month, provided that guards and turnkeys who are on duty not more than eight hours per day shall receive one hundred and fifteen dollars per month. All other officers and employees shall receive such compensation as may be agreed upon between them and said board. All salaries shall be paid in monthly installments. The board shall make a pay roll containing the names of every officer andemploye, with the amount due each, which shall be kept at the penitentiary and a certified copy thereof filed in the office of the state auditor. Such salaries shall be paid out of the fund appropriated for the pay of civil officers: Provided, that if at any time the appropriation shall be exhausted, such salaries shall be paid out of the earnings of the penitentiary appropriated for that purpose. The chaplains and matron shall perform such duties as are herein provided."

In none of the above sections, do we find any provision made for "subsistence" for the officers or employes of the state penitentiary. Provision is made only for compensation or salary.

In the case of Windmiller v. The People, 78 Ill. App. 273, l. c. 276, the Court defined the term "salary" in the following language:

> "The term 'salary' means a reward or recompense paid for personal service. As applied to a public officer it means the compensation paid him for the personal service in the discharge of the duties of his office."

And, in the case of Commonwealth v. Bailey, 3 Ky. Law Reports, 110, l.c. 114, the Court defined the term "salary" as follows:

> "Or, in other words a salary is 'an annual or periodical payment for services' (Webster), or 'an annual or periodical payment for services; a stipulation, periodical recompense' (Worcester). 'A fixed sum paid

> to a person for his services yearly, half-yearly, or quarterly; stipend, wages; (Store-mouth)."

In the ordinary popular sense, it is "certain fixed and periodical remuneration for services".

In re Chancellor (Md), 1 Bland 595, l. c. 630, the Court said:

> "A salary is a compensation for services rendered; it is the periodical payment of a certain value, in money, for work and labour done."

Thus it may be said that the term "salary" means a fixed and periodical remuneration for services in money, and we are of the opinion that such is the meaning of the term as it is used in Sections 8319, 8391, and 8394, supra.

In the Laws of Missouri, 1935, Section 1, sub-section "D", at page 72, we find the following provision in the appropriation act for the Missouri State Penitentiary:

> "D. Operations:
>
> "General expense; including communication, printing and binding, regulative, transportation of things, travel, and other general expense; material and supplies, consisting of household supplies, subsistence, clothing, rewards, discharged inmates, bonds, insurance..... $740,000.00"

60 Corpus Juris, Section 1170, cites cases to the effect that "subsistence" is synonymous with the term "support" (Majors v. Lewis and Clark County, 201 P. 268, 269), and that "support" includes something more than mere food (Board of Com'rs for Caldwell County v. Sidney Spitzer & Co., 91 S. E. 707, 708).

Thus we find a provision made in an appropriation act for subsistence or food for the governing staff and employees of the penitentiary, but no provision is made for same by statute. The question then to be determined is whether the Legislature can legislate by an appropriation act.

In the case of State v. Thompson, 289 S. W. 338, l.c. 341, 316 Mo. 272, the Court, in holding that the Legislature cannot legislate by an appropriation act, said:

> "As has been observed in well-reasoned cases, if the practice of incorporating legislation of general character in an appropriation bill should be allowed, then all sorts of ill conceived, questionable, if not vicious, legislation could be proposed with the threat, too, that, if not assented to and passed, the appropriations would be defeated. The possibilities of such legislation and this court's condemnation thereof are well illustrated in the case of State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 S. W. 403, as well as the following cases from other states: State ex rel. v. Carr, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163; Com. v. Gregg, 161 Pa. 582, 29 A. 297."

Providing for "subsistence" in the appropriation act, supra, is tantamount to an attempt at legislation by an appropriation act, and therefore void. If the governing staff of the penitentiary and the employees are entitled to subsistence they must look to the statutes, and here we find no provision for same.

Section 8419, R. S. Mo. 1929, provides that no products are to be sold to officers or employees of the penitentiary except for the use and benefit of the State and is as follows:

> "Neither the warden nor the superintendent of industries shall sell or give to any of the officers or employes of the prison any fuel, forage, pro-

visions or manufactured articles under his charge, nor permit such things to be taken or used except for the use and benefit of the state. Any alleged violation of this provision may be examined into by said board, and if found to be true, shall be held to be just cause for the removal of the warden or superintendent of industries, or both, as the case may be."

Section 11406, R. S. Mo. 1929, provides in part as follows:

"Every employe or official of the state of Missouri, who is on a regular salary or per diem, shall have a designated place as headquarters and no suchofficial or employe shall be entitled to, or receive, any compensation or reimbursement for any subsistence expense, (meals or lodging) while at headquarters. ***"

Section 8419, supra, in clear and unambiguous language prohibits the selling or giving away of any subsistence such as fuel, forage, provisions or manufactured articles belonging to the penitentiary to any officer or employee of the prison, and Section 11406, supra, prohibits them from receiving such subsistence by virtue of the fact that they have their headquarters in Jefferson City.

From the foregoing sections, we are of the opinion that no officer or employee of the Missouri State Penitentiary is entitled to any subsistence.

/

II.

)

Superintendents of institutions under department of penal institutions are not entitled to subsistence.

Section 8373, R. S. Mo. 1929, provides for the appointment of a superintendent for the State Industrial Home for Girls, as follows:

> "The board shall appoint a superintendent of said industrial home, said superintendent to hold office at the pleasure of said board, The said board shall also appoint a sufficient number of employes to carry on the institution under the provisions of this article in the most economical manner."

Section 8386, R. S. Mo. 1929, provides for the appointment of a superintendent for the State Industrial Home for Negro Girls, as follows:

> "The board shall appoint a superintendent of said industrial home to hold office at the pleasure of said board. The said board shall also appoint a sufficient number of employes to carry on the institution under the provisions of this article in the most economical manner."

Section 8471, R. S. Mo. 1929, provides for the appointment of a superintendent of the Intermediate Reformatory, as follows:

> "The commissioners of the department of penal institutions shall appoint a superintendent for said institution, who shall be selected with a view to his educational training, experience, general fitness and special interest in the reformation of offenders. Before entering upon the duties of his office said superintendent shall give a bond to the state, with sufficient surety, in the sum named by said commissioners and shall be sworn to a faithful performance of his duties."

Section 8346, R. S. Mo. 1929, provides for the appointment of a superintendent at the Missouri Training School for Boys, as follows:

> "The state prison board shall have full control and management of said reformatory and shall, from time to time, adopt such by-laws, rules and regulations, not inconsistent with law, as may be deemed best for the management of said institution; said board shall elect a superintendent and such other officers and em-

> ployes as may be necessary for properly conducting said institution, who shall hold their offices during the pleasure of the board, and shall fix the salaries of such officers and employes, which shall be paid monthly."

We have searched the statutes as to what compensation the superintendents of the State Industrial Home for Girls, State Industrial Home for Negro Girls, and Intermediate Reformatory, may receive and have not found any statutory authority authorizing any salary. The only mention of a salary of a superintendent is that of the Missouri Training School for Boys, but that is not fixed.

The Appropriation Act, found in the Lawsof Missouri, 1935, pages 74 and 75 (Intermediate Reformatory), p. 76 (Missouri Training School for Boys), p. 78 (State Industrial Home for Girls), p. 80 (State Industrial Home for Negro Girls) authorizes the payment of moneys for salaries for superintendents.

The commissioners of the department of penal institutions evidently fix compensation for superintendents by virtue of Section 8394, R. S. Mo. 1929, which provides in part:

> "**** all other officers and employees shall receive such compensation as may be agreed upon between them and said board."

The terms "compensation" and "salary" are used interchangeably in our statutes with respect to payment (State v. Farmer, 196 S. W. 1106, l.c. 1108, 271 Mo. 306) and we are of the opinion that the term as used in Section 8394, supra, is synonymous with the term salary.

As we have pointed out, the term "salary" doesn't include "subsistence", and we are therefore of the opinion that the department of penal institutions (board) have no authority to agree with superintendents of the respective penal institutions under their supervision, for any other thing than payment of money for services rendered.

You state in your letter that the present penal board

"finding no statutes prohibiting the allowance of subsistence has approved subsistence want lists". As heretofore pointed out, the rule is that the board must point to a statute to authorize subsistence and, if there be no statute, then the board cannot grant or allow subsistence. The penal board is governed by statute and said board must therefore look to its statutory authority to allow subsistence. You have the rule reversed. The rule is that when there are no statutes prohibiting the allowing of subsistence then the board cannot allow same.

Respectfully submitted,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

MW/JLH/afj

PUBLIC OFFICERS: Denied the right to become interested in contracts made in their official capacity.

January 7, 1936

FILED 45

Hon. W. Ed Jameson,
President, Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

We wish to acknowledge your letter of January 3, 1936, wherein you state as follows:

> "Please refer to Section 2, page 411, of the Laws of Missouri 1933, which reads as follows: 'The Purchasing Agent shall negotiate all leases and purchase all lands.'
>
> "Inasmuch as the authority for leasing land for the state institutions rests in the State Purchasing Agent, I would like to inquire if it would be permissible for State Hospital #1, Fulton, Mo., to lease a farm from William Woods College of Fulton, Mo. I ask this for the reason I happen to be chairman of the Eleemosynary Board and President of the Board of Trustees of William Woods, but it seems clear to me that the authority for making the lease is in the Purchasing Agent, who has been exercising such authority in leasing farms for farming and grazing at the several eleemosynary institutions."

The question presented is whether your dual capacity as President of the Board of Managers of the State Eleemosynary Institutions and President of the Board of Trustees of William Woods College would so conflict as to prevent William Woods College from leasing a farm to State Hospital No. 1 at Fulton, Missouri.

The law is well established that public officers are denied the right to become interested in contracts made in their official capacity. This is based on the principle that no person can faithfully serve two masters representing diverse or inconsistent interests at the same time. The court in the case of Stockton Plumbing & Supply Co. v. Wheeler, 229 Pac. 1021, l. c. 1024, in recognizing this principle, said:

> "The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed. The principle has always been one of the essential attributes of every rational system of positive law, even reaching to private contractual transactions, whereby there are created between individuals trust or fiduciary relations. The voice of divinity, speaking from within the sublimest incarnation known to all history, proclaimed and emphasized the maxim nearly two thousand years ago on occasions of infinite sacredness.
>
> "The personal interest of an officer in a contract made by him in his official capacity may be indirect only, still such interest would be sufficient to taint the contract with illegality. If his interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void because contrary to public policy, the policy of the law being that a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large."

And to the same effect is the case of Wardell v. Railroad Co., 103 U. S. 651, l. c. 658, wherein the court said:

> "It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' Marsh v. Whitmore, 21 Wall. 178, 183."

An examination of the Missouri statutes discloses that the power to lease lands is by virtue of Laws of Missouri, 1933, Section 2, page 411, placed in the hands of the State Purchasing Agent, thus:

> " * * * He shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

The Constitution of the State of Missouri does not vest the power of leasing lands in the Board of Managers of the State Eleemosynary Institutions, and hence you, as president of such board, would have no authority to negotiate leases for the State Eleemosynary Institutions, the power being exclusively vested in the State Purchasing Agent. No conflicting interests being present, we are of the opinion that it would be permissible for William Woods College to lease a farm to State Hospital No. 1 at Fulton, Missouri.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

ELEEMOSYNARY BOARD: Records are privileged, but if waived may be inspected by any interested party;

INSPECTION OF RECORDS: board may make reasonable rules respecting the same. If suit is pending, the court may order inspection; subpoena duces tecum will produce records in court.

2.6

January 14, 1936

FILED
45

Hon. W. Ed Jameson,
President, Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your inquiry which is as follows:

> "At a meeting of our board on Monday, December 23rd, the question came up in regard to the privilege of inspecting the records of the insane persons in the several mental hospitals. It had particular reference to a letter addressed to Stephen K. Owen by D. W. Sherman, of the legal firm of Blackwell & Sherman, and upon motion of our board I was directed to obtain an opinion from your office as to the authority of the officials of these institutions with reference to the inspection of any of the records pertaining to insane people.
>
> "Will you, therefore, kindly furnish this office with your opinion in regard to this matter, and oblige."

By Section 8574, R. S. Mo. 1929, it is provided that the eleemosynary board "shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions," and that the title to all such property then or thereafter acquired shall be vested in the board of managers for the use of the institution.

By Section 8580 the "person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed as manager."

By Section 8592 it is provided that "the steward shall be the custodian of all the property of every kind and description belonging to the institution for which he has been appointed steward."

Section 8685 provides as follows:

> "The board of managers shall have power and authority to create the office of and to appoint examining physicians for this institution, whose duty when so appointed shall be to examine all applicants for admission, as is provided for in section 8686 of this article, in such counties, cities, points or localities as may be determined, ordered and directed by the board of managers. Reports of such examinations shall be made upon the blanks provided by the superintendent. Each examining physician appointed under the provisions of this section shall keep a proper book for the registry of all examinations made by him, and after the same are duly registered he shall forward the original examination without delay to the superintendent of the sanatorium. No fee shall be charged or collected from applicants furnishing the certificate entitling them to admission to the sanatorium as free patients as is provided in section 8686 of this article, but all other applicants for examination shall be charged a fee of five dollars."

Section 8565 empowers the board to "make all necessary rules, regulations and by-laws for the government, discipline and management of such institution not inconsistent with the laws of this state, and such rules, regulations and by-laws, when so made and adopted by the board, shall be binding upon all officers and employes of the institution, and shall remain in force and effect until changed or annulled by the board by an order entered upon the records of such institution."

The authority of the Legislature to delegate to commissions or boards the power to make reasonable rules and regulations has been sustained by the courts very generally.

State ex inf. Killam v. Colbert, 201 S. W. 52, 273 Mo. 198;
State ex rel. City of Sedalia v. Public Service Com. of Mo., 204 S. W. 497, 275 Mo. 201;
State ex rel. City of Sedalia v. Public Service Com. of Mo., 40 S. Ct. 342, 251 U. S. 547, 64 L. Ed. 408;
City of St. Louis v. Public Service Com. of Mo., 207 S. W. 799, 276 Mo. 309;
City of St. Louis v. Public Service Com. of Mo., 207 S. W. 805;
State v. Freeland, 300 S. W. 675, 318 Mo. 560;
Arnold v. Hanna, 290 S. W. 416, 315 Mo. 823, Judgment affirmed (1928), 48 S. Ct. 212, 276 U. S. 591, 72 L. Ed. 721;
State ex rel. v. Thompson, 60 S. W. 1077, 160 Mo. 333, 54 L. R. A. 950, 83 Am. St. Rep. 468.

You do not state whether your board has promulgated any rules with respect to the question you inquire about. However, it appears that they have such authority, provided the rules are reasonable and not in conflict with the statutory law.

The law with reference to the right of access to, inspection and use of public records at common law is stated in 55 C. J., page 624, as follows:

> "At common law a person may inspect public records in which he has an interest or make copies or memoranda thereof, when a necessity for such inspection is shown and the purpose does not seem to be improper, and where the disclosure would not be detrimental to the public interest; but the gratification of mere curiosity, or motives merely speculative, or the creation of scandal, will not entitle a person to inspection or to make copies or memoranda."

It will be noted that Section 8685, in part, provides as follows:

> "Every examining physician appointed under the provisions of this section shall keep a proper book for the registry of all

> examinations made by him, and after the same are duly registered he shall forward the original examination without delay to the superintendent of the sanitorium."

The case of Robison v. Fishback, 93 N. E. 666, 669, 175 Ind. 132, holds that a "public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done."

In the case of Galli v. Wells, 209 Mo. App. 460, l. c. 473, the court, in speaking of city hospital records and the right to inspection by the public, says:

> " * * * and although kept by public officials they are not for the benefit of the public, as the public has no interest in them, and therefore they are not such public records as come within the exception to the rule. Ordinarily such records are not open to the public because of the privilege statute, but where that statute is waived, as in the present case, the records of the City Hospital, a public institution, kept under requirement of the law, are like other public records and are open to the public."

In the case of Kirkpatrick v. Wells, 319 Mo. 1040, l. c. 1045, the court says:

> "Plaintiffs contend the court should not have admitted in evidence the record of St. John's Hospital purporting to show the disease with which Kirkpatrick was afflicted when confined therein, for the reason that said hospital is not a public institution, there is no rule of law requiring records to be kept by private hospitals, and they were not kept by officers under the law.
>
> "It is not objected that the record is privileged. Plaintiffs admit if the record offered in evidence was the record of a public hospital, it should have been admitted.

> (Galli v. Wells, 209 Mo. App. 460, 239 S. W. 984.) Under the general rule all records required by law to be kept are admissible if properly identified. (St. Louis v. Arnot, 94 Mo. 275, 7 S. W. 15; Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055; St. Louis Gaslight Co. v. St. Louis, 86 Mo. 495; Levels v. St. Louis & H. Railroad Co., 196 Mo. 606, 94 S. W. 275.) Section 5812, Revised Statutes 1919, requires public and private hospitals to keep a record of the diseases of all patients. Therefore, a record kept by St. John's Hospital in compliance with the law is of equal dignity with a record kept by a public hospital. If a record of a public hospital is admissible, there can be no sound reason why a record of St. John's Hospital is not admissible. The person or persons making the record are performing a public duty under the law. The court ruled correctly, and the contention is overruled."

In the case of State v. Keller, 143 Ore. 589, in considering the right of the public to inspect the records of the corporation commissioner, where the statute required him to keep such records and empowered him to decline to disclose same when not required for public welfare, the court says, l. c. 601:

> "The public must always have access to all public records required to be kept or made by a public official unless the statute specially provides otherwise."

Section 1731, R. S. Mo. 1929, provides:

> "The following persons shall be incompetent to testify: First, a person of unsound mind at the time of his production for examination; * * * Fifth, a physician or surgeon concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon."

In the case of Ex parte Gfeller, 178 Mo. 248, l. c. 267, the court said:

> "Our statute places attorneys and physicians upon substantially the same grounds with respect to privileged communications, and it was held in Thompson v. Ish, 99 Mo. 160, that the protection afforded by the statute against calling a physician to give evidence of the information acquired in a professional character from his patient, may be waived by the latter or those representing him after his death, for the purpose of protecting rights acquired under him. The court said:
>
> "'Notwithstanding our statute provides for no exception, still it deals with a privilege, and it must be taken as established law that the privilege may be waived by the patient; and we have held that it may be waived by the representative, and, in this, our ruling accords with that of the Supreme Court of Michigan under a like statute. If the patient may waive this right or privilege for the purpose of protecting his rights in a litigated cause, we see no substantial reason why it may not be done by those who represent him after his death, for the purpose of protecting rights acquired under him.'"

In the case of Smart v. Kansas City, 208 Mo. 162, l. c. 197, speaking on the question of privileged communications and the records of the city hospital, the court said:

> "The defendant's next contention is that the court erred in excluding the evidence of Dr. Frederick. He was one of the attending physicians at the City Hospital, and was the keeper of and had charge of the records of the institution, which were required to be kept by the ordinances of the city. The defendant offered to prove by him the diagnosis of plaintiff's case, as shown by said official record, when she was in the hospital in the years 1895,

1896 and 1898, the latter when her leg was amputated. The plaintiff objected to the evidence offered because the entries made were privileged communications, first made to the attending physicians in order that they might correctly diagnose her case and to properly treat her. The diagnosis of the case was made by an examination of the patient and by interrogating her regarding the complaint. This is necessary to be known by the physician in order that he may prescribe the proper treatment, and when he once acquires that information the law declares it to be confidential communications, and disqualifies the physician from divulging the same upon the witness stand.

"Mr. Elliott in his work on Evidence, in the discussion of such statutes says: 'It seems to be conceded in both opinions that hospital physicians, who attend such persons at the hospital, could not testify as to what they learned while so attending him.' (1 Elliott on Evidence, sec. 635; Grossman v. Supreme Lodge, 6 N. Y. Supp. 821.)

"This is undoubtedly the rule as announced by all the authorities, and that being so, it seems that it must follow as a natural sequence that when the physician subsequently copies that privileged communication upon the record of the hospital, it still remains privileged. If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit and the statute nullified by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered in evidence containing the diagnosis, and thereby accomplish, by indirection, that which is expressly prohibited in a direct manner.

"The only intimation of any law to the contrary we have been able to find is in a foot note to section 635 of Elliott on Evidence, vol. I, which reads as follows: 'On the other hand, if one voluntarily goes to a public hospital where a record is required to be kept, is there not some reason for saying that there is no privilege, or that he waives his privilege, at least so far as the law requires a public record to be kept?' Mr. Elliott cites no authority whatever in support of the above suggestion, nor does he even dignify it by giving it a position in the text of his valuable work on evidence. But if that suggestion is sound law, what is the use of going through the empty form of writing the diagnosis into the record? Why not call the physician and let him testify direct as to those matters? Certainly the testimony of the physician would be more satisfactory than the record, because he would be under oath when giving his testimony and would be subject to cross-examination. In the case at bar Dr. Frederick testified that he did not know whether the entries made in the record were true or false; that the house surgeon writes the diagnosis in the record, and that he had no personal knowledge as to the truthfulness of the things written.

"The mere fact that the ordinance of the city requires such a record to be kept is no reason on earth why the statute regarding privileged communications should be violated. That record is required to be kept for the benefit of the institution and not for the benefit of outside litigants. It is not the object or purpose of the ordinance to repeal the statute in question, but even if it were it would be null and void, because in conflict with the statute. The object of the statute is to guarantee privileged communications between <u>all patients</u> and their physicians, and it is wholly immaterial whether they are in or out of hospitals. The only case where the patient is denied the protection of this statute is where his or her case

> falls under the rule of necessity, heretofore mentioned and so ably discussed by Judge Burgess in the case of Cramer v. Hurt, 154 Mo. 112."

In the case of Cramer v. Hurt, 154 Mo. 112, the court held that in certain cases where justice would be prevented by declining to permit the physician to testify as to privileged communications, the physician could testify, announcing it as the doctrine of necessity, and states, l. c. 118:

> "'For, where the law can have no force but by the evidence of the person in interest, there the rules of the common law, respecting evidence in general, are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the matter of the subject presumes none better to be attainable.' (1 Greenleaf on Evid. (14 Ed.), sec. 348.)"

We have referred to or quoted all of the statutory law in Missouri that we find relevant to the question of inspection of records of a state eleemosynary institution in this state.

In the case of Excise Commission v. State, 179 Ala. 654, 60 So. 612 (1912), the court said:

> "With respect to records other than judicial, no statute to the contrary intervening, the public generally have no absolute right of access or inspection. Any one who demands the right can be properly required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose. But, for the public and for individuals showing such a right, the custodian of official documents is a trustee; and, while he may and should preserve them against impertinent intrusion he should allow ready access to those who have an interest in them, and who claim access for the purpose of promoting or protecting it."

In an opinion by this office dated July 3, 1934, on the question of who has the right of inspection of birth and death certificates filed in the Bureau of Vital Statistics, the following was stated:

> "The Supreme Court of Missouri seems to follow this general rule. In the case of State ex rel Thomas v. Hoblitzelle, 85 Mo. 620 (1885) there was involved the right of a candidate for office who had been defeated according to the announced election results to inspect the poll books used in his election, and the court in the course of an opinion holding that the relator had a right to such access, said:
>
> "'While we regard the poll books as belonging to that class of public records, open to inspection when the applicant who desires to inspect them, shows that the purpose of the inspection is to vindicate some public or private right, the courts will by mandamus compel the inspection on condition that the inspection be made "under such reasonable rules and regulations as the court or officer having them in charge may impose." Whether mandamus will or will not lie to compel an inspection of poll books when it is sought simply for the gratification of curiosity without any purpose to vindicate either a private or public right, is not necessary to determine in this proceeding, as it does not present such a case.' (85 Mo. 624.)
>
> "The language above quoted was quoted with approval in State ex rel. Conr n v. Williams, 96 Mo. 13, 8 S. W. 771 (1888). See also State ex rel Gay v. Reyburn, 158 Mo. App. 172, 138 S. W. 79 (1911); State ex rel Gay v. Jones, 158 Mo. App. 170, 138 S. W. 81 (1911).
>
> "Sherwood, J., delivered a concurring opinion in the Hoblitzelle case in which he stated that he believed the true rule to be broader than that adopted by the majority of the court, and stated that in his opinion the plaintiff should have been granted the relief.

sought on the basis of the simple allegation that he was a citizen, without showing any special interest, and Judge Sherwood used the following language:

"'Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and as such interested in the execution of the laws.' (85 Mo. 625).

"However, the rule in Missouri does not seem to be as broad as that contended for by Judge Sherwood, and apparently it would be necessary for one seeking to inspect public records to show some public or private interest to be served by such inspection.

"It is our opinion that any citizen would have a right to inspect the records and certificates of birth and death filed in the Bureau of Vital Statistics upon a showing by him that he had some interest in the document which is sought, and that the inspection is for a legitimate purpose, and unless the public official who has custody of such documents reasonably feels that the request is an impertinent intrusion, or not in good faith, such official is under a duty to allow inspection and to certify copies of such records if a reasonable need therefor is shown, and compliance by such official could be compelled by mandamus."

We have not found a Missouri case deciding that the guardian for an insane person has or has not authority to waive on behalf of his ward the legal production of privileged communications, but on principle it would appear that the same right of waiver should exist in favor of a guardian of an insane person as the courts of this state have decided does exist with respect to the representatives of a deceased person.

The Legislature of this state has seen fit to provide a method of procuring information as to records where they properly pertain to the administration of justice, and by

following that course the records of the institution may be inspected and the facts as they speak them may be produced in the courts.

Section 924, R. S. Mo. 1929, provides:

> "Every court or judge thereof shall have power to compel any party to a suit pending therein to produce any books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein."

Section 925 provides the course to be followed by the party seeking such information.

Section 927 provides the penalty for refusal to obey the order of the court for the production of such information.

Section 928 provides for an order of court permitting the adverse party to inspect and copy or photograph such papers, and provides the penalty for refusal to comply with the order.

Likewise, if such suit is pending, the party seeking such information has the right to have the records of the institution brought into court under a subpoena duces tecum for use in the trial of the case.

CONCLUSION

The records of the state eleemosynary institution that are kept by that institution and are the recording of a physician's professional diagnosis or conclusion, or the history of the case, or of any fact which was revealed to him in such examination on account of its being appropriate or necessary in order for him to properly professionally diagnose or treat such case, are privileged communications, notwithstanding such records are kept as a result of compliance by him with a statute requiring such, and they may not be used nor exhibited to the public without the consent of the person so examined or treated, nor may they be used in a suit, unless the privileged character be waived by said patient, absent the rule of necessity. If said patient has a duly appointed guardian, such guardian has the authority to waive the privilege. If said insane patient has no guardian, then

there can be no waiver of the privileged communication. If the privilege is waived, the record is a public record and any person having an interest in such record, or whose rights are or reasonably may be thought to be affected by such record, has the right to inspect such record; that such right of inspection includes the right to make memoranda therefrom and photograph thereof; that if the board of managers of such institution declines to so permit such interested party the information as set forth in this conclusion, such interested party has the legal right to enforce the same by mandamus proceedings; that the board of managers of the state eleemosynary institution has authority to make any reasonable rules governing such inspection, including the time, place and manner thereof, and may reasonably determine who are interested parties entitled to such record information.

If a suit is pending between such person desiring an inspection of the hospital records and said eleemosynary institution, the party to such suit who seeks such record information and procures an order of the court in which the cause is pending directing such eleemosynary institution to permit an inspection and photographing of such records is entitled to such inspection and such information as said records may show. He is likewise entitled to have such records produced in court on a subpoena duces tecum at the trial of the case.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

OSTEOPATH: Osteopaths have legal right to participate as a physicians in sanity inquest on county patients.

- -

February 20, 1936.

2-25

FILED
45

Honorable W. Ed. Jameson
President, State Eleemosynary Board
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated January 31, 1936, reads as follows:

> "Please note the enclosed letter from the superintendent of State Hospital #1, Fulton.
>
> "It has been my understanding that osteopaths have had the same standing under the law as ordinary physicians, but I may be mistaken.
>
> "In order that our superintendents may be on safe ground will you kindly let us have an opinion from your office with reference to the question brought before me by Dr. Ralf Hanks, superintendent at Fulton, and oblige."

The attached letter from the Superintendent of State Hospital No. 1, reads as follows:

> "The County Physician of Montgomery County is an osteopath and quite a number of committments from that county are signed by him and by no other physician. I should appreciate it if you will get an opinion for us as to the legal status of this. Whether or not an osteopath has a legal right to sign these papers."

Section 8646 R. S. Mo. 1929, provides that in a proceeding by a County Court to determine the sanity of a county patient one of the witnesses in attendance must be a physician, thus:

> "At the time appointed, unless the investigation shall be adjourned over to some other time, the said court shall cause the witnesses in attendance to be examined before themselves, or a jury, if one be ordered for the purpose, duly chosen and impaneled, according to the practice of the court. At least one of the witnesses examined shall be a reputable physician."

It is noted that when one, adjudicated as insane, is delivered to the State hospital it is the duty of the Superintendent to receipt for said person and treat him as a patient.

In ex parte Griggs 214 Mo. App. 304, l. c. 306, 248 S. W. 609, the Court said:

> "On the mere statement or declaration of the physician of the Industrial home that she is of feeble mind, she has been transferred to the Colony for the Feeble-minded and Epileptic there to be kept 'until restored to reason.' No inquiry was had or adjudication was rendered finding her to be of feeble mind. Nor was any opportunity afforded her to be represented at any hearing. * * * * We think her confinement in the institution at Marshall is without authority of law."

In the case of State ex rel. Harnell, v. Cole County, 80 Mo. 80, l. c. 83, the Supreme Court said:

> "The fact that McGirk, then a citizen of Cole County, was placed in the lunatic asylum in July, 1880, as a pay patient, is not controvertible, and in no way dependent on the question whether his sanity at the inquest of lunacy was tried by six or twelve jurors. While such a question might affect the regularity of the action of the probate court in appointing a guardian,

it cannot affect the fact that he was confined in the asylum as a pay patient, nor the fact that he was subsequently, by the order of the county court, made a county patient. We will, therefore, in the disposition of the case, consider the order as being sufficiently efficacious to make said McGirk a county patient of Cole county from the time it was made."

CONCLUSION.

We are herewith enclosing an official opinion of this Department rendered September 20, 1933, to Honorable Davis Benning. In said opinion this Department held that an osteopath is a physician within the sense that the term "physician" is used in the County Hospital Act. The same statutory construction is again applicable in the statutes relating to adjudication of insanity, where the term "physician" appears. Nothing in the Eleemosynary Act prescribes the school of healing to which said physician must profess, and it is not for this Department to construe said term "physician" to the exclusion of a physician licensed to practice osteopathy in this State. When the Legislature made it possible for osteopaths to hold the office of county physician, it would be repugnant to the intention of the Legislature for us to say that an osteopath is not a physician intended to perform the physician's ministerial duty at an insanity inquest. The Grigg's case, supra, holds that the physician's report is but a mere statement and no part of a legal inquest.

As in State ex rel. Yarnell, supra, it is presumed that the County Court followed the procedure prescribed for the adjudication of insanity, and that its warrant of arrest and commitment was issued pursuant to legal adjudication, and was sufficient to make said patient a County patient of Montgomery County from the time it was made. When a patient is delivered pursuant to the statutory warrant, it is not for the Superintendent to review the sanity proceedings, but it is the duty of the Superintendent to receipt for the patient as the statutes provide, and said patient may be discharged by him, when in the Superintendent's opinion the reason is restored.

The fact that an osteopath was used as a witness in the inquest, and filled out the statutory history of the case, and that no other physician was used as a witness to note the history, as detailed by statute, in no way alters the duty of the Superintendent to receipt and take legal custody of the insane person.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

COUNTY BUDGET ACT: Insane pauper patients not sufficiently harmful to be sent to State Hospital may be kept at County Farm and expense therefor paid out of Class 5.

X

2-29

February 28, 1936.

FILED
45

Hon. W. Ed Jameson,
President Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of February 24 wherein you make the following inquiry:

> "Down in Stoddard County they have about thirty patients they want to send to State Hospital #4 at Farmington. A lot of them are of low mentality and are perfectly harmless and can be taken care of just as well in their County Farm.
>
> "They have asked me if any Class A funds under the Budget Law can be used for that purpose. My understanding is that the care of the insane is a first charge upon the counties and must be paid before anything else can be paid, but if the law can be construed so that some of the money can be used to keep a certain class of patients in their own county, it would help relieve the terrible congestion that we have in these institutions."

You mention that they have asked if any Class A funds under the Budget Law can be used for that purpose. We presume this statement refers to Class 1 under Section 2 of the County Budget Law (Laws of Mo. 1933, p. 341), which is as follows:

> "The county court shall set aside and apportion a sufficient sum to

> care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes."

In view of the terms used in Class 1, it is our opinion that the county court can only use such funds for insane pauper patients actually confined in state hospitals; hence, the county court cannot use funds from this class to maintain such patients at the county farm.

Class 5 of Section 2 of the County Budget Act (Laws of Mo. 1933, p.342) provides:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

CONCLUSION

In view of the fact that Class 5, supra, contains the clause "and expense of paupers not otherwise classified", it is the opinion of this department that the only funds which may be used by Stoddard County in maintaining the thirty patients which it proposes to send to the State Hospital at Farmington would be funds from Class 5. Of course, if the county is financially able

to provide for the first five classes, it could spend the balance for such purpose, as set forth in Class 6 of the Budget Act.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COURT REPORTER: Fees for transcribing bill of exceptions in criminal cases where defendant is poor person.

March 10, 1936 3-11

FILED
45

Mr. Edward O. Jackson
Official Reporter
Twenty-ninth Judicial Circuit
Clinton, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of February 24, 1936, in which you request the opinion of this Department, which letter is as follows:

> "At the opening of the September Term of our Circuit Court, Mr. E. B. Silvers filed a motion to quash the regular panel selected for that term by the county court, on the ground of illegality in its selection. Most if not all of the attorneys having business on the docket for that term either appeared or waived for their clients at its hearing. The hearing on the motion involved a week, and much testimoney was taken. At its conclusion the motion was overruled. Subsequently Mr. Silvers represented one Arthur Hall in a trial which resulted in Hall's conviction and an appeal has been taken. The Court ordered me under the statute to make a Bill of Exceptions in the case State vs. Hall, which I have done. Mr. Silvers insists upon having the testimony taken on the hearing of the motion to quash the panel transcribed as a part of this bill of exceptions; he having objected to the panel in the Hall case, and incorporated his

> motion in the record. I have hesitated to transcribe this record on the motion as being a proper part of the bill of exceptions, and if not the State would be under no obligation to pay me for the work. Of course, if the evidence taken on the motion to quash the jury panel is a proper part of the bill of exceptions in the Hall case, it would also be of all the other cases tried at the term on appeal where the point was made in the trial.
>
> "I would like to have your opinion as to whether I could rely upon the State's payment for this work, even when supplemented by a further order of Judge Calvird's upon me to make the same. The Judge himself is doubtful as to whether I could expect the State to pay for this supplemental Bill, as it would be comparatively large."

If we understand your question correctly, it is - Whether or not the motion to quash the regular panel selected for the September Term of the Henry County Circuit Court, and the hearing and all the proceedings in connection with said motion, may be incorporated in the bill of exceptions in the case of State v. Arthur Hall, a case tried by said alleged improper jury, and whether or not the State would be compelled to pay you, as Official Court Reporter, costs and fees for transcribing the testimony taken on a hearing of the motion to quash, the court having made an order that the defendant, being unable to pay the costs of such transcript, be permitted to appeal as a poor person as provided in Section 11722, R. S. Mo. 1929.

Section 11719, R. S. Mo. 1929, sets forth the duties of the official court reporter, and is as follows:

> "It shall be the duty of the official court reporter so appointed to attend

> the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings: to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

Section 11722, R. S. Mo. 1929, provides in part as follows:

> "**Provided that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; * * * *"

From the statement made in your letter it would be impossible for this Department to render an opinion that would be binding on the State Auditor (assuming that the Hall case is a felony case) in auditing the costs, if eventually such cost bill should reach his office.

If the hearing on the motion to quash the panel was not part of the trial in the case of State v. Hall, we do not see how you could be required to incorporate same in the bill of exceptions in said case. In other

words, if it was a separate and distinct hearing it would not properly be, in our opinion, a part of the bill of exceptions in the Hall case.

Since you state in your letter that,"if the evidence taken on the motion to quash the jury panel is a proper part of the bill of exceptions in the Hall case, it would also be of all the other cases tried at the term on appeal where the point was made in the trial," therefore, we must assume from your statement that it was not a part of the bill of exceptions or record in the Hall case. We not see how a separate and distinct hearing of an issue can be engrafted on to the Hall case by merely saying that it is a part of same.

It is impossible for us to give you a "Yes" or "No" answer on the statement in your letter, for the reason that we deem it a matter for the trial court to pass on, he having all the facts and circumstances before him on the record as made as to whether said hearing on the motion to quash should be made a part of the bill of exceptions in the Hall case. However, we might say that if it was stipulated and agreed and the court had made an order that this hearing be made a part of the bill of exceptions in the Hall case, and by an order of record the court ordered you to incorporate same as a part of the bill of exceptions, it would seem that you would be protected for your fees in the transcribing of same. Of course, to have said costs paid it would further be necessary later for same to be certified to by the Judge and Prosecuting Attorney as to its correctness, as provided by Section 3842, R. S. Mo. 1929, on the final disposition of the case.

Yours very truly,

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

CRH:EG

PROBATE JUDGE: Probate Judge acting as exofficio clerk required to give bond as such

3-11

March 11, 1936

FILED 45

Emsley C. James
Judge of Probate Court
Clinton County
Plattsburg, Missouri

Dear Judge James:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "In the matter of bond for Probate Judge in this County I have filed bond under the law as required. But in this county the Judge does not hire a clerk, he is his own clerk by virtue of law, Ex-officio. In this County the salary run about $1200.00 which is below the amount allowed to be retained. Now am I required to give bond as Ex-officio Clerk separate to the bond given by the Judge. In this County the Clerk's duties are entirely ministerial."

Under the provisions of Section 11782, Revised Statutes Missouri 1929, a Judge of Probate Court is required to give a bond before collecting or being authorized to collect any fees whatsoever, said section reads, in part, as follows:

> "* * * * * * Every probate judge shall before collecting, or being

> authorized to collect, any fees whatsoever, give a good and sufficient bond in a penal sum, which, in counties of less than one hundred and fifty thousand inhabitants, shall be equal to the compensation of a circuit judge in such county, and which in counties of over one hundred and fifty thousand inhabitants shall be in a penal sum of double such compensation of a circuit judge in such county; every which bond shall have good and sufficient sureties, to be approved by the said clerk of the circuit court having jurisdiction in such county, and shall be filed with such clerk,* * * * * * * * * * * "

Under the provisions of Section 2049,Revised Statutes Missouri 1929, a probate judge who acts exofficio as his own clerk is required to give a bond in like amount with like conditions and penalties, the same as is required of clerks filling said office by appointment. Said section provides, in part:

> "The judge of probate is required to act ex officio as his own clerk, and give bond in like amount, with like conditions and penalties, to be approved by the judges of the county court, filed and recorded, the same as is required of clerks filling said office by appointment; Provided, that any judge of probate may,by an entry of record in said court, appoint a separate clerk,who shall be paid by said judge and shall hold his office at the pleasure of the judge. Said clerk shall take the oath required of other clerks of court in this state, and, before entering upon the duties of his office, shall enter into a bond to the state of Missouri, with two or more good and sufficient sureties,

> to be approved by the judge, in the sum of one thousand dollars, conditioned that he will faithfully discharge all the duties of his office; which bond shall be filed and recorded in the office of the county clerk of the county where such clerk of probate is to serve, upon which bond, when breach thereof is made, suit may be brought as upon other penal bonds; * * * * * *"

In view of the above it is the opinion of this Department that a probate judge is required to give bond, as Judge, under the provisions of Section 11782, and he is also required, when he acts as exofficio clerk, to give a bond, as such clerk, under the provisions of Section 2049, supra.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

JET:LC

ELEEMOSYNARY INSTITUTIONS: Counties must pay board of managers in cash for up-keep and support of insane poor, but the sending of a warrant or a check, if such represents cash, complies with Section 8636, R. S. 1929.

May 19, 1936.

5-73

FILED
45

Honorable W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

This is to acknowledge your letter as follows:

"I enclose you herewith letter from the County Treasurer of Jackson County, asking if they could not group together for payment the accounts of two or more wards, from the county in the state eleemosynary institutions, and pay them with one warrant. He further asked if we could not be permitted to accept the warrants at the institutions in payment of these accounts.

"In view of the fact all counties are now operating under the Budget Law, and the further fact that maintenance of these patients is the first charge upon the revenue, I would like to ask if there would be any objection to counties sending us warrants, but not giving them credit on our books until the warrants have been cleared. I feel quite sure many counties would send their warrants promptly, if we were permitted to do this."

Section 8636, Laws of Missouri, 1935, page 388, provides in part as follows:

> "The several county courts shall have power to send to the state hospital such of their insane as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars ($6.00) per month for each patient; and in addition thereto * * * * * * *; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to designate and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

The above statute is unambiguous and specifically requires payment by the counties for their insane poor in cash to the board of managers. However, the words "In cash" do not mean that the counties must send the cash money but could, in lieu thereof, send something representing cash, i.e., a check. However, no matter in what form the payment is sent it must be reducible immediately to cash. In other words, if the county court sends a check, that check must be good and negotiable and the money receivable on demand therefor. We perceive no objection to the county court sending a warrant, if said warrant is payable on demand in cash. But if it is necessary for the warrant to be protested or held any length of time in order to receive the cash thereon such would not amount to a payment of the county's indebtedness for insane poor.

You will thus understand that the method employed, whether by check or warrant, by the counties in paying for the support and maintenance of their insane poor would be a matter of form only, if in fact such check or warrant represented or was immediately convertible into cash. In our opinion, we see no reason why the board of managers (if it so desires) may not accept county warrants in payment of county indebtedness for support and maintenance of insane poor in state hospitals if such warrants are convertible on demand into cash.

You will understand that by virtue of the Laws of Missouri, 1933, pages 414-415, that all moneys received by the board of managers of eleemosynary institutions must be placed in the state treasury. Consequently, a warrant, if such had to be protested and was not immediately payable into cash, should never go into the state treasury. Thus, if the Board of Managers accepts warrants from the counties in payment of the support and maintenance of insane poor, such warrants must be payable in cash on demand. Otherwise, the acceptance of warrants would be violative of Section 8636, supra, in our opinion.

We answer your question "if they could not group together for payment the accounts of two or more wards and pay them with one warrant," check or cash payment, in the affirmative, in our opinion, just so long as the grouping indentifies the wards for which payment is made.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

X

ELEEMOSYNARY INSTITUTIONS: County patient, upon inheriting money in excess of exemptions allowed by law, must be made pay patient by order of the County Court

6.12

June 12, 1936

FILED
45

Mr. W. Ed Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

We have your request of June 9, 1936 for an opinion, from which request it appears that one Ludwig W. Rottler, non compos mentis, is a county patient in State Hospital No. 4 from the County of Ste. Genevieve; that the Mother of this patient recently died and left a will, which, among other things, placed $1,000.00 in trust, the income thereof to be used for the support of Ludwig W. Rottler during his life, and a further bequest of $2,000.00 to Ste. Genevieve County on account of said Ludwig W. Rottler.

The question presented is, whether or not said Ludwig W. Rottler should be made a pay patient instead of a county patient.

Section 8636, Laws of Missouri 1935, page 388, provides, in part, as follows:

> "The several county courts shall have power to send to a state hospital such of their <u>insane poor</u> as may be entitled to admission thereto."

Section 8664, R.S.1929, in part, provides that the term "insane poor", when applied to a person without a family, means one whose property does not exceed, after payment of debts, the exemptions allowed under the State law. From

the statement of facts in this case it would appear that Ludwig W. Rottler, in addition to the income from the $1,000.00 in trust, has $2,000.00 available for his care and support.

Section 8654, R. S. 1929, specifically deals with county patients who may at some time come into possession of sufficient funds to pay for their keep in a State insane hospital. This section provides as follows:

> "If the county court of the proper county shall so order, the clerk thereof shall transmit to the superintendent a certificate,under his official seal, setting forth that any county patient in the state hospital from his county has sufficient estate to support and maintain him at the hospital. After the receipt of this certificate, the patient shall be a pay patient; and in such cases, charges shall be made out and paid and a bond shall be required and executed as in all other cases of pay patients; and upon a failure thereof, after reasonable delay,the superintendent shall discharge such patient in the manner as provided in this article in case of poor persons."

It is, therefore, the opinion of this office that the said Ludwig W. Rottler is, at this time, entitled to the benefits of more than $2,000.00 in cash, for his care and maintenance in a State hospital, and, therefore, is not within the meaning of the State law an <u>insane poor</u> person; that under such circumstances it is the duty of the county court to make the order required by Section 8654, R. S. Mo. 1929, transferring the said Ludwig W. Rottler

from a county to a pay patient, and to pay for such care from the moneys now left in trust for the said Ludwig W. Rottler.

Yours very truly,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:LC

APPROPRIATION - Eleemosynary may contract for inspection of boilers in connection with its institutions, same may be paid from "Operation Fund".

July 31, 1936.

8/,

FILED
45

Honorable W. Ed Jameson,
President, Board of Managers,
State Eleemosynary Institutions,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of July 30th requesting an opinion, as follows:

> "Will you please advise me if it will be proper and legal for the Eleemosynary Board to enter into a contract with the Fidelity and Casualty Insurance Company of New York for the purpose of inspecting the boilers in the several institutions under this board.
>
> "The water we use in the boilers of these institutions is highly impregnated with chemicals that have a tendency to clog up the tubes and valves in the boilers and it is highly important that we have expert inspection at regular intervals for both the protection of the boilers and the safety of the employees and inmates of these institutions."

The appropriations made by the General Assembly for the support of the eleemosynary institutions of the state for the years 1935 and 1936 (Laws of Missouri, 1935, page 39, et seq.) provide for each institution a fund denominated "Operation", which said fund is to be expended for "general expense, and material and supplies."

Section 8574, R. S. Mo. 1929, provides in part as follows:

> "The board of managers of the eleemosynary institutions shall have the care and control of the property, real and personal, owned by the state and used in connection with the several institutions, and the title to all real estate or personal property now owned by said eleemosynary institutions or by the state for their use or that may hereafter be purchased by, or donated to such institution, shall be vested in the board of managers for the use and benefit of said institution."

In view of the foregoing, it is the opinion of this department that the inspection of the boilers of the eleemosynary institutions of this state is a reasonable and necessary expense to the proper care and upkeep of said institutions, and that said expense may be paid from the Operation funds of the several institutions.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:HR

SHERIFFS FEES: Amount allowed for actual miles traveled.

August 8, 1936.

8-8 FILED 45

Honorable O. B. Jennings
Clerk Circuit Court
Howell County
West Plains, Missouri

Dear Sir:

We have your request for an opinion of this office upon the following facts:

> "The arresting officer drove 40 miles in arresting and bringing before the Justice three prisoners. They filed a separate case against each defendant making three cases. Is the county liable to the officer for 40 miles claimed on each warrant or a total of 120 miles? Or are they liable for just 40 miles the actual distance traveled?"

Section 11792 R. S. Missouri 1929, covers this matter fully. We quote the pertinent portions thereof:

> "Sheriffs,****shall be allowed for their services in criminal cases*** as follows: Ten cents for each mile actually traveled in serving any**** writ***when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

It is therefore the opinion of this office that sheriffs shall be allowed mileage only for miles actually traveled in serving any writ.

Respectfully submitted

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

FER:MM

TAXATION: When American Legion is exempt from taxation.

August 20, 1936.

FILED 45

Mr. W. C. Jeffries
Assessor for Camden County
Camdenton, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion under date of August 18, 1936, which reads as follows:

> "Please look up and see if property owned by American Legion is taxable."

Article X, Section 6, Missouri Constitution provides what property is exempt and what property is subject to exemption from taxation in Missouri. This section reads as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

We look to the general law and see what the Legislature has done. Section 9743, R. S. Mo. 1929 was passed pursuant to the above constitutional provisions, and reads in part:

> "* * * *sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

The American Legion exists as a corporation by an Act of Congress, and the Act of incorporation may be found in United States Statutes at Large, p. 284. Said Act expressly provides that membership is limited to those who served in the Great War, and the articles of incorporation declare the purpose of the organization to be as follows:

> "Sec. 3. That the purpose of this corporation shall be: To promote peace and good will among the peoples of the United States and all the nations of the earth; to preserve the memories and the incidents of the great war of 1917-1918, to cement the ties of love and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country."

CONCLUSION.

It could not be seriously disputed that the American Legion is an institution of purely public charity within the meaning of Article X, Section 6 of the Missouri Constitution and Section 3743 R. S. Mo. 1929.

We are of the opinion that it originated as a charitable institution. As such, it is entitled to constitutional and statutory exemptions from taxation as they relate to exempting real estate belonging to said corporation and used for the purpose of the organization.

We are of the opinion that any lot belonging to the American Legion, located in an incorporated city or town in Missouri, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when used exclusively for organization purposes, are exempt from taxation.

For any additional real estate, and for all personal property, the American Legion is subject to taxation in Missouri. The exemption is specifically limited to acreage and to exclusive charitable uses. The constitutional and statutory exemption is not a license for the American Legion or any other charitable organization to use any part of their property for commercial purposes and financial gain and at the same time be entitled to tax exemption.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

ELECTIONS: Occupants of private homes, partially supported by the county are not inmates of poorhouses within the meaning of the Constitution of the State of Missouri and Section 10178 R.S. Mo. 1929.

October 20, 1936. 10-20

FILED 45

Honorable Owen G. Jackson, Chairman,
Board of Election Commissioners,
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of October 16, requesting an opinion as follows:

> "One Deiselhorst, through an arrangement with the county court, conducts what is known as the Elm's Home at Ferguson. There are about forty old persons and unemployables who have shelter and board there. The county pays to said Deiselhorst the sum of thirty dollars a month per each inmate.
>
> "We are informed, and it is a fact, that each inmate is required to do certain tasks in connection with the upkeep of this Home, such as scrubbing, cleaning and washing dishes; and that their clothing is provided through relatives or charitable institutions. Money contributions from other sources are also received by the Home.
>
> "These persons have all been permitted to register and expect to vote at the general election. We are informed that their right to vote will be challenged under Section 10178 Revised Statutes of Missouri, 1929, which provides "that no person while kept at any poorhouse or other asylum at public expense * * * shall be entitled to vote at any election under the laws of this state", while Article 8 of the State Constitution, Section 2 provides that "all citizens of the United States shall be entitled to

> vote except persons while kept in any poorhouse at public expense."
>
> "Will you please advise this Board whether in your opinion the inmates of the Elm's Home are entitled to vote at the general election?"

The question which you present has often been submitted to this department. It appears that the facts in the individual cases govern largely. The statute in question, Sec. 10178, R.S. Mo. 1929, disqualifies or prohibits persons while kept in any poorhouse or other asylum at public expense from voting. Section 2, Article VIII of the Constitution of the State of Missouri contains the proviso that no idiot, no insane person and no person while kept in any poorhouse at public expense shall be entitled to vote. The statute cannot be broader than the constitutional section. However, we are only concerned with the words "no person while kept in any poorhouse at public expense **** shall be entitled to vote."

The statute contemplated prohibiting persons under certain disabilities from voting. It is our opinion that it was the intention of the Legislature to prohibit persons legally committed to a county poorhouse or infirmary within the meaning of the statutes respecting the support of the county poor from voting. Section 12951, R.S. Mo. 1929 defines those deemed to be poor persons as follows:

> "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Sections 12953 to 12967 inclusive set forth the powers of the county court in respect to the general maintenance of the poor. Under Section 12950, R.S. Mo. 1929, it is mandatory on the county to relieve, maintain and support poor persons. It would appear that Mr. Deiselhorst is conducting a private home for poor persons in which the occupants do menial tasks and that he receives charitable contributions in the form of money and clothing for the occupants besides the sum of $30.00 a month from the county for the support of each person.

The general rule, which varies according to the constitutional and statutory provisions in the state, is set forth in 20 Corpus Juris, Sec. 31, p. 72, as follows:

> "It is a general rule, affirmed by constitutional or statutory provisions in some states, that as a rule persons supported in institutions maintained wholly or partly at public expense or by charity neither lose their right to vote at the places of their former residence nor acquire the right to vote in the districts wherein such institutions are located. A constitutional provision to this effect is not retroactive, nor does it apply to persons in institutions which are neither public nor charitable within the meaning of the law. Since, however, the question of intention is important, according to the weight of authority when a person voluntarily abandons his residence and becomes an inmate of a public or charitable institution with the intention of making it his permanent residence, he becomes a qualified voter in the precinct wherein such institution is located after the required period of residence, notwithstanding a constitutional provision of the nature already stated, but there are cases holding otherwise."

In the case of In Re Registry, 10 Pa. 213, it was held that former paupers in an almshouse who have been discharged as such but who remain in that institution under contract of services for hire, are entitled to vote as residents of the precinct.

Again, in 48 Corpus Juris, Sec. 257, p. 543, the general rule in regard to support in poorhouses, is thus stated:

> "Unless the statute expressly confers on overseers of the poor the power so to do, they cannot remove and maintain a poor person, against his will, in a poorhouse outside of the poor district to which such poor person belongs. Under the statutes in some jurisdictions paupers may be sent to,

and kept in, the county poor-house at the expense of the county, if the provisions of the statutes as to the persons to be admitted and the proceedings preliminary to admission are complied with."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the constitutional section and the statutory provision refer to persons who are legally committed to poor-houses or infirmaries within the meaning of Sections 12950 to 12967 inclusive, R.S. Mo. 1929. The fact that Mr. Deiselhorst receives compensation from the county would not of itself constitute his institution a poorhouse within the meaning of those sections unless it is primarily a part of the county poorhouse or infirmary and is regarded and treated as such by the county.

There are numerous persons throughout the State who receive support and aid from their county when not confined in a county infirmary, and this of itself does not disqualify such persons from voting. It would appear that Mr. Deiselhorst is more or less maintaining a private home and the arrangements with the county are probably temporary in nature. The occupants of the home are not permanent - they may leave at will or be removed by relatives or by Mr. Deiselhorst himself. We are therefore of the opinion that the occupants of the Elm's Home are entitled to vote in the coming general election.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SOLDIERS AND SAILORS: Can vote in St.Louis County if they can establish a legal residence, independent of the fact that they are soldiers and sailors in the regular United States Army and Navy.

October 27, 1936

10-29

FILED
45

Honorable Owen G. Jackson, Chairman
Board of Election Commissioners
Clayton, Missouri

Dear Mr. Jackson:

This Department is in receipt of your letter of October 16, and your question briefly is,

> "Can soldiers and sailors vote in the coming election in St. Louis County?"

We are grateful to you for your suggestions and for pointing out the sections which relate to the same.

In 1921, Laws of Missouri 1921 page 710, by popular vote the following proposition was submitted to the people:

> "Soldiers' Votes; Absent account of Military Service.
>
> That section 11, of article 8, Constitution of Missouri is hereby repealed and a new section adopted in lieu thereof:
>
> The legislature shall, by general law, make provision enabling qualified electors of this state, absent from the state on account of military service, to vote at general and special elections."

In 1924, Section 8 of Article VII of the Constitution was adopted, which reads:

> "Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

Pursuant to the provisions of Section 9 the legislature has enacted absentee ballot voting in Missouri. The present law dealing with the same, amended slightly in 1935, is laws of Missouri 1933 pages 219 to 225, inclusive. The present situation with soldiers and sailors appears to be there is no consitutional prohibition against them voting, irrespective of the provisions of Section 10178, Revised Statutes Missouri 1929.

Referring to the new laws relating to St.Louis County, passed by the legislature in 1935, page 230,Section 2, dealing with the qualifications for voting, is as follows:

> "Every citizen of the United States who is over the age of twenty-one years, or who will reach the age of twenty-one years on or before the day of the next election, including primary elections, following the registration and who will have resided in this state one year next preceding the first election held after the registration and during the last sixty days of the time shall have resided in the county where such election is held, who has not been convicted of bribery, perjury, or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, who is not kept at any poorhouse or other asylum at public expense, except the soldier's (soldiers') home at St.James and the confederate home at Higginsville, who is not confined in any public prison or jail and who is not otherwise disqualified as a voter at said election,by the provisions of the Constitution and the laws of the

> state of Missouri, shall be entitled to register and vote at such primary election, or elections, for all officers, state, county or city made elective by the people, or at other elections held in pursuance of the laws of the state, but shall not vote elsewhere than in the precinct where his or her name is registered, and whereof he or she is registered as a voter."

We think the above section controls the qualifications for voting in St.Louis County, instead of Section 10178. Therefore, each voter must possess the qualifications as set forth in the above section. There is no provision in the above section which prohibits or grants the right to soldiers and sailors in the military service to vote, but we are confronted with the provisions of Section 7 of Article VIII of the Constitution of Missouri, which is as follows:

> "For the purpose of voting, no person shall be deemed to have gained a residence by reason of his presence,or lost it by reason of his absence, while employed in the service either civil,or military, of this state, or of the United States; nor while engaged in the navigation of the waters of the state, or of the United States, or of the high seas, nor while a student of any institution of learning, nor while kept in a poor-house or other asylum at public expense, nor while confined in public prison."

There has never been any construction or interpretation made by our courts as to soldiers and sailors voting. However, we think the decision in the case of Goben v. Murrell 195 Mo. App. 1. c. 109, is applicable to soldiers and sailors, in principle:

> "Under our election law a student neither loses his old residence nor gains a new one during his absence from the former, or presence

at the latter. It is true that this law does not preclude his becoming a resident and voter at the school town or city, but his intention must be evidenced by something more than his mere physical stay in the place. He must intend to make it his home - not that he shall remain for life - but his home indefinitely. And so if he comes into the place for the temporary purpose of getting an education and then to leave for other parts, he has not such a residence as entitled him to vote. (Matter of Garvey, 147 N. Y. 117).

"The same kind of residence (except in some cases as to length of time) necessary to make a legal voter will qualify a person to hold office. Would one suppose that mere students are eligible to the offices at the locality of the school? There are municipalities in which schools are located, where the students outnumber the citizens proper. It certainly would strike one as extraordinary to learn that it was in the power of these nontaxpaying sojourners to wrest the city or county government from the voice and hand of the permanent citizens."

CONCLUSION

We are of the opinion that the soldiers of the United States Army of Jefferson Barracks will have to present more evidence than the mere fact that they are residing physically in St.Louis County. We do not believe that Section 7 of Article VIII expressly prohibits soldiers and sailors from voting, but, as stated in the Goben v. Murrell case, supra, the soldier's intention must be

evidenced by something more than his mere physical stay in the place; he must intend to make it his home, not necessarily for life, but indefinitely. In the last analysis, it devolves upon the judges of election to determine whether the soldiers are qualified from their utterances, as is stated in the case of In re Lankford Estate 272 Mo. 1.

We therefore rule, bearing in mind what we have said above, that the soldiers and sailors are not precluded in St.Louis County from voting due to the fact that they are soldiers and sailors, but they have the additional burden of proving that they are bona fide residents of the county, independent of the fact that they are soldiers and sailors.

Of course, soldiers and sailors who were legal residents of St.Louis County before entering the Army cannot be questioned; and soldiers and sailors from the State who possessed residential qualifications in the State of Missouri before entering the Army,can cast absentee ballots in the State of Missouri.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:LC

COUNTY BUDGET ACT: Salary of Janitor should be in Class 4
Estimate for Sup't. of County Farm should be placed in Class 5, when superintendent is not paid regular salary but receives compensation from the county court for boarding and maintaining each inmate.

January 29, 1936.

1-29

FILED
46

Honorable R.L. Jones,
Clerk of County Court,
New Madrid County,
New Madrid, Missouri.

Dear Sir:

This department is in receipt of your letter of January 21 wherein you make inquiry as to the classification of certain appointive officials of the county under the County Budget Act. Your letter is as follows:

> "We have received your opinion with regards to the appropriations for the Farm Bureau and Health Officer, in which you state that the Farm Bureau is optional with the County Court and that the salaries for any optional officer should be paid from Class six.
>
> "We desire just a little further information; the janitor of the Court House is appointive by the County Court for a year at a time. Should his salary be paid from Class four or Class six?
>
> "Also, with reference to our County Farm, we appoint a superintendent for a term of one year, and he feeds the inmates on a specified basis of $14.50 per month, the county to furnish their clothes, smoking tobacco, etc., in addition to the rate for feeding. We own the farm and rent it to the Superintendent for cash rent, and all the necessary buildings on it for the inmates are furnished by the county. We have been paying all this expense from Class Five. Is this correct?
>
> "We would like an answer to these questions immediately, and an opinion in detail is not absolutely necessary, because we are preparing our budget for this year."

I

The Janitor

It appears that the janitor of a court house is not appointed under the provisions of any statute. However, in the various counties of the state a janitor of the court house is appointed, usually, as stated in your letter, for a period of one year. Regardless of the fact that there is no statutory authority for appointing a janitor, the courts of our state have held in a number of decisions that it is the duty of the county court to provide the offices with a janitor.

In the case of Ewing v. Vernon County, 216 Mo. 681, the court said (l.c. 692-694):

> "Turning to other cognate sections it becomes plain that unless the Legislature deliberately planned to legislate against recorders and in favor of other county officers (an unthinkable position), it becomes plain that the county is to furnish the necessaries in furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public. No one reading statutes relating to clerks, probate judges, etc., can come to any other conclusion. (See R.S. 1899, secs. 1647, 1648, 1654, 1662, 1750, 1763, 6710, 522 and 523.) By section 1750, supra, the circuit judges in cities having a population of 100,000 may appoint a janitor and the duties of such janitor are to keep the rooms of said court in an orderly and clean condition, etc. We assume that the object of this statute was not to make a statutory rule in favor of order and cleanliness in great cities as contradistinguished from small cities and counties, but was to graft on an exception and take away from the county courts of counties having such cities, the appointment of janitors for courtrooms--i.e., the statute by excepting counties having such cities and vesting the power in the circuit courts to appoint janitors there, recognizes, somewhat by way of a negative pregnant, that the general duty to supply janitor services in other instances rests with county courts.

> "Finally, we shall assume that among civilized people approved advances and results in scientific research make janitor services in public offices (i.e., the prevention of the propagation and spread of disease from filth) a necessity, and that the Legislature knew and gave effect to that fact. Buildings, under Revised Statutes 1899, section 6710, for clerks' and recorders' offices, being for the preservation of the records of the county, how could this main idea have effect if those records are not to be kept and preserved free from deterioration from filth? Is the general public not interested in and benefited by clean windows, clean floors, clean furniture, clean spittoons, heat in winter and wholesome, healthy air at all times in public offices? It is useless to argue that question. It answers itself. And if the county court, as the agent of the general public in county affairs, without legal right or excuse, refuses to do that duty in the recorder's office, what is the recorder to do? His only sensible course is to do what this recorder did, viz., avoid an unseemly wrangle, pay it out of his own pocket and trust to the courts and the law to reimburse him. The judgment on the first count is affirmed."

Therefore, we conclude that the janitor of the court house receives an appointment similar to the county physician, superintendent of the county farm, county highway engineer, etc.

Class 4 of the County Budget Act (Laws of Mo. 1933, page 341) provides:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under

class six."

Class 4 refers to the salaries of county officers which are by law payable out of the ordinary revenue of the county. The question arises whether or not this would include the salary of the janitor. We have heretofore held that the words "salaries of all county officers" included both elective and appointive officers.

Conclusion

It is the opinion of this department that it was the intention of the Legislature to include in Class 4 all officers and appointees whose salaries under the law the county court is bound to pay out of the general revenue, which includes employment for the fiscal year; hence, it is our opinion that you should include the compensation of the janitor of the court house in Class 4.

II

Superintendent of County Farm

Under the terms of Section 12958, R.S. Mo. 1929, it is the duty of the county court to appoint a superintendent of the county infirmary, said section providing as follows:

> "Whenever such poorhouse or houses are erected, the county court shall have power to appoint a fit and discreet person to superintend the same and the poor who may be kept thereat, and to allow such superintendent a reasonable compensation for his services."

The above section states that reasonable compensation for the services of the Superintendent shall be allowed, but does not state in what form or in what manner compensation shall be received by the Superintendent. It is a rather unique method that your county compensates its Superintendent, but it may easily come within the term "reasonable compensation".

We have heretofore held that the compensation of the superintendent of the county infirmary should be placed in Class 4, but due to the unusual method which your county uses in employing the Superintendent, it would be difficult for your county, in making up the budget, to determine just what would be the exact

compensation for the year for the Superintendent of the Infirmary. You cannot determine how many inmates will be cared for on the basis of $14.50 per month - the item of cash rent which you exact from the Superintendent can be determined--in fact, the Superintendent is not paid a salary in the ordinary sense of the word. He appears to board the inmates and the county pays the board.

Class 5 of the County Budget Act (Laws of Mo. 1933, Sec. 2, page 342) provides:

> "The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Conclusion

Under the method employed by your particular county in hiring a superintendent of the county infirmary, it is the opinion of this department that the estimate should be placed in Class 5, and that the same can be termed "contingent, emergency and incidental expense," likewise, the items of clothing, tobacco, etc.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

TAXATION: Cost of publishing delinquent list to be paid out of County Treasury.

January 29, 1936.

FILED
46

Honorable Alvin H. Juergensmeyer
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Sir:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

> "The County Collector advertises land for sale under the delinquent tax law. The land does not bring the amount of the taxes the first time advertised and it will be sold again next year. Is the newspaper entitled to its pay when the land is advertised or must the newspaper wait until the land is sold before the advertisement is paid for?
>
> If the newspaper is paid now, does the County Court advance this money for the Collector, or who pays the newspaper?"

The publication of delinquent lists of lands and lots was originally provided for in Section 9952b, page 430, Laws of Missouri 1933, as an integral part of the Jones-Munger Act. By an examination of this section it will be seen that the expense of such printing was to be paid by the purchaser of the land sold and the cost of such printing was to be prorated and taxed as costs of the sale. There was no provision whatsoever for the taxing of these costs against the county or for the county advancing to the newspaper the cost of this publication.

This office in an opinion to the Missouri Democrat, dated August 18, 1933, held that under the provisions of that Section the expense of publication of the list of delinquent lots could not be charged to the county and that the county court had no authority to pay such costs out of the general revenue.

However, the Fifty-eighth General Assembly passed Senate Bill 57, which became operative before it was necessary to publish the list of delinquent lands and lots in the fall of 1935. This act, found at page 402, Laws of Missouri 1935, amended Section 9952b, by striking out the last line of that section and enacting in lieu thereof the following sentence:

> "The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed One Dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

The Legislature could have had but two things in mind by making this change. First, to make it unnecessary for the publication to wait for its costs until the taxes had been paid, together with costs, and second, to provide that the cost of such printing be advanced out of the County Treasury, the County receiving reimbursement therefore when and if the costs are collected. The section is silent as to exactly when the newspaper is entitled to receive its pay. However, there should be little question as to this matter. It should receive its compensation a reasonable time after proof of publication is made, or as soon thereafter as the county has funds available under the budget act for the payment of this expense.

CONCLUSION.

In view of the foregoing, it is the opinion of this office that the cost of the newspaper publication is to be paid for from the county treasury, out of the general revenues

of the county and that the newspaper is to receive its compensation at a reasonable time after proof of publication is made and the account has been presented to the County Court for approval, provided the county has funds available for the payment of that class of claim.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

SCHOOLS: Use of public funds in aid of sectarian institutions void.

May 7, 1936.

5-14

FILED
46

Hon. Crosby C. Johnson,
Prosecuting Attorney,
Caldwell County,
Hamilton, Missouri.

Dear Sir:

This department wishes to acknowledge receipt of your request for an opinion under date of April 29th, as follows:

> "I have been requested to submit the following question to you for your opinion:-
>
> "St. Rita's is a parochial school maintained by the Catholic Church in Clinton County, at Cameron, and a part of the school is a high school. Clinton County adjoins Caldwell County, and a student residing in one of the common school districts in Caldwell County has been attending the St. Rita's high school this current school year. I understand that no arrangements were entered into between this common school district and the high school, or school authorities conducting this high school, for this student to attend. The Directors of this common school district are now being asked by St. Rita's to pay from the district funds tuition for this student. Can they legally pay from the school funds tuition for a student attending such a parochial school?"

Section 9270q, Missouri Statutes Annotated (Laws of Missouri, 1935, Section 16, page 351), reads in part as follows:

> "The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered."

What is meant by an "approved high school" as used in the above section? Does same include private as well as public schools?

In the case of In re Estate of Ryan, 156 S. W. 759, l. c. 761, 174 Mo. App. 202, the court said:

> " * * * it is the duty of the court, in construing statutes, to interpret particular words by reference to the context so as to effectuate the intention of the lawmakers as reflected by the entire enactment, if such may be fairly ascertained, rather than to declare the precise meaning of the word standing alone."

In examining the context, we find the following sections of the Revised Statutes of Missouri, 1929, which leads us clearly to the conclusion that what the Legislature had in mind was public schools and not private schools.

Section 9447 authorizes the State Superintendent of Schools to classify the "<u>public high schools in the state</u>" as follows:

> "The state superintendent of public schools shall have authority to classify the public high schools in the state

> into first, second and third classes, and shall prescribe minimum courses of study for each class: * * * "

And Section 9448 authorizes the State Superintendent to inspect and approve them, as follows:

> "For the purpose of classifying high schools and having their work accredited by higher educational institutions, the state superintendent of public schools shall, in person or by deputy, inspect and examine any high school making application for classification, and he shall prescribe rules and regulations governing such inspection and examinations, and keep complete record of all inspections, examinations and recommendations made. He shall, from time to time, publish lists of classified high schools: Provided, he may drop any school in its classification, if, on reinspection or re-examination, he finds that such school does not maintain the required standard of excellence."

However, should there still be any question as to whether "approved high schools" as used in Section 9270q, supra, included private as well as public schools, these doubts are dispelled by the following constitutional provision and cases interpreting same.

Article XI, Section 11, of the Constitution of Missouri provides as follows:

> "Neither the General Assembly nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the

> State, or any county, city, town or other municipal corporation, for any religious creed, church or sectarian purpose whatever."

We have been unable to find any Missouri cases construing the above constitutional provision, and hence we must look to states having similar constitutional provisions for interpretation.

In the case of Synod of Dakota v. State, 2 S. D. 366, 50 N. W. 632, l. c. 635, the court said:

> "* * * the framers of our state constitution intended to guard with zealous care the funds of the state, counties, and municipalities, collected from taxes imposed upon all the members of the community, composing the various religious sects, from being appropriated for the benefit of or to aid any one or more sectarian schools or institutions, or in fostering or building up any one or more sects within the state. The policy of prohibiting the use of funds belonging to all for the benefit of one or more religious sects has been adopted in most of the states. No one, we think, can mistake the intention of the framers of the constitution, as expressed in these various sections of that instrument, to prohibit in every form, whether as a gift or otherwise, the appropriation of the public funds for the benefit of or to aid any sectarian school or institution. What, then, constitutes benefit or aid? Webster defines 'benefit' to mean 'whatever contributes to promote prosperity; * * * add value to property; advantage; profit.' 'To aid' is defined by the same author 'to support, either by furnishing strength or means to help to success.' The demand of plaintiff is for money due for the tuition of a class of students alleged to have been instructed under a contract with the board of education. Would not the payment of this demand be for the benefit of or to aid the university? Is not the tuition received from every student for the benefit of or to aid the school, to support, to strengthen, it? Do not such institutions depend mainly

> upon the tuition fees of students they can obtain for their support? But the learned counsel for plaintiff strenuously contends that the sum due plaintiff will not be contributed for the benefit of or to aid the university, but in payment for services rendered the state, or to its students, in preparing them for teaching in the public schools. This contention, while plausible, is, we think, unsound, and leads to absurd results. If the state can pay the tuition of 25 students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds? The theory contended for by counsel would, in effect, render nugatory the provisions of the constitution, as the claim that the appropriation was made as compensation for services rendered could be made in all cases. This theory, carried out to its legitimate results, would enable any one leading sect to control the schools, institutions, and funds of the state, as it could claim it was rendering services for the funds appropriated. It was undoubtedly to prevent such possible results that these provisions were inserted in the constitution. It matters not how much consideration has been given by services rendered, the language is emphatic and unqualified that no money shall be given or appropriated for the benefit of or to aid any sectarian school, society, or institution. The paying of the tuition of pupils in the Pierre University to the plaintiff in this case will, in our opinion, be for the benefit of or to aid such school or institution, and is clearly within the prohibition of the constitution."

And in the case of Bennett v. City of La Grange, 153 Ga. 428, 112 S. E. 482, l. c. 485, the court said:

> "By a law of that state the territorial board of education was authorized to designate private universities, colleges, and academies in which instruction should be given to pupils in the methods of teaching, and in pursuance of this law the board of education contracted with Pierre

University, a Presbyterian institution, for the instruction of a class of students in pedagogy. The Supreme Court of South Dakota held that the prohibition in the Constitution of that state against the appropriation of money or other property to aid any sectarian school applied to all appropriations to such schools, whether made as a donation or in payment for services rendered the state by such school, and that the contract between the board of education and this Presbyterian university was void because in conflict with the above provision of the Constitution of that state. Synod of Dakota v. State of South Dakota, 2 S. D. 366, 50 N. W. 632, 14 L. R. A. 418. A school connected with an orphan asylum controlled by officers of the latter who were Sisters of Charity of the Roman Catholic Church in which religious instruction is given to Roman Catholic children is a sectarian institution within the constitutional provision against using public funds for 'sectarian purposes.' State v. Hallock, 16 Nev. 373. The inhibition of section 3, art. 8, of the Illinois Constitution, against any payment from public funds in aid of any sectarian institution prohibits payment by Cook county for the tuition and maintenance of dependent girls, committed by the county court, under the law of that state, to the Chicago Industrial School for Girls, a corporation which places the girls committed to it in certain institutions under the control of the Roman Catholic Church, and to which institution such payments would in fact go. Cook County v. Chicago Industrial Schools for Girls, 125 Ill. 540, 18 N. E. 183, 1 L. R. A. 437, 8 Am. St. Rep. 386. In the case last cited the Supreme Court of Illinois held that--

"'Money paid to a school in consideration for services rendered, and not as a mere gratuity, is none the less an aid to the school, and is therefore within the constitutional inhibition against the use of public funds to aid sectarian schools.'

"Counsel for defendants in error strongly rely upon the case of Dunn v. Chicago Industrial School for Girls, 280 Ill. 613, 117 N. E. 735, L. R. A. 1918B, 207, in which the Supreme Court of Illinois held that--

"'The payment to the Chicago Industrial School for Girls, an incorporated Catholic school (under the control and management of the Roman Catholic Church), by Cook county, of an amount less than the actual cost of clothing, medical care, and attention, and education and training in useful arts and domestic science for the maintenance, etc., of Catholic girls committed thereto by the Juvenile Court Act, * * * is not in violation of the provision of the Illinois Constitution which prohibits "any appropriation or payment, from any public fund whatever, of anything in aid of any church, or sectarian purpose."'

"We cannot agree with the conclusion reached by the Supreme Court of Illinois in this case. The argument by which the court reached its conclusion therein is not satisfactory. This argument is based on the facts that in the preamble to the Constitution of Illinois expression is given to the gratitude of its people for the religious liberty which they had been permitted to enjoy, that the Constitution of Illinois declared for the 'free exercise and enjoyment of religious profession and worship, without discrimination,' and that the Constitution provided that property used exclusively for religious purposes may be exempted from the burden of taxation. The court further says that the people of that state, not only did not declare hostility to religion, but regarded its teachings and practices as a public benefit, which might be equaled to the payment of taxes. The court further says that it was not the intention of the Constitution that institutions to which wards of the state might be committed should be absolutely divorced from religion or religious teaching. The court further put its decision upon the ground that this school received less than

the cost of the training of the girls committed to its care, and therefore it did not amount to giving aid to the school. The court likewise undertook to distinguish the case it then had under consideration from that of County of Cook v. Chicago Industrial School for Girls, supra. The distinction drawn between the two cases is that it did not appear in the former case that the school was getting less than the cost of the service it rendered to the county of Cook.

"The reasoning of the Supreme Court of Illinois in Dunn v. Chicago Industrial School for Girls, supra, does not appeal to us. It is true that the Constitution of Illinois does not declare hostility to religion. So the Constitution of Georgia does not declare hostility to religion. The Constitution of Illinois declares in favor of religious liberty; so does the Constitution of Georgia. The Constitution of Illinois exempts property used for religious purposes from taxation; so does the Constitution of Georgia. But both Constitutions declare against giving aid to sectarian schools and institutions. When the state selects a sectarian institution of learning, and commits to such institution its wards, for whose maintenance and education it pays, it gives the most substantial aid to such an instituion. On the same principle the state could undertake to educate all its children in such sectarian institution, and pay them for the education of its children in such institution rather than in public schools and public institutions of learning. Any such course would be giving the most valuable aid to such sectarian schools and institutions.

"So, when the city of La Grange made the contract with the Salvation Army, by which the latter, a sectarian institution, assumed the care of the poor of that city, although at actual cost, this was giving a great advantage and the most substantial aid to the Salvation Army in the prosecution of its benevolent and religious purposes. The giving of loaves and fishes is a powerful instrumentality in the successful prosecution of the work of a sectarian institution. So we are of the opinion that the taking of money from the public treasury of the city of

> La Grange, in payment to the Salvation Army for its care of the poor of that city, amounts to the taking of money from its treasury, directly and indirectly, in aid of this sectarian institution, in violation of this provision of the Constitution of Georgia."

And in the case of Williams v. Stanton Common School District, 191 S. W. 507, l. c. 514 (withdrawing former opinion, 172 Ky. 133, 188 S. W. 1058), the court said:

> "It may be true, and we are not disposed to doubt it, that the plan under which these two institutions operated was very beneficial to the children enrolled in the graded school, and that under its operation they derived moral as well as educational advantages that could not be secured if the graded school were conducted as an independent institution entirely free from the control or supervision of Stanton College or its public spirited president. But no odds how beneficial to the graded school or children the scheme may have been, it cannot be doubted that it was opposed to the spirit of the laws, and its invalidity is not to be condoned because the trustees of the graded school and a majority of the patrons of the school approved it. If it had the approval of all the patrons and all the children, it would yet be open to the condemnation that it was in violation of the Constitution as well as antagonistic to the public policy of the state. The trustees seem to have had the impression that because the arrangement was a good thing for the graded school, no one else should question its propriety, but the trustees of graded schools should not forget that these schools, as well as all common schools, are state, not local, institutions, and the people of the whole state are concerned in everything that affects any one of them either for good or evil.
>
> "To authorize the validity of this arrangement here in question would be to encourage the creation of other like arrangements be-

tween other graded and common schools and other sectarian institutions, and presently we would have the common schools here and there throughout the state operated in connection with that denominational school that happened to have the largest influence and membership in the particular community where the union was made. That such a course would surely create deep and bitter resentment and dissatisfaction among many people and in many parts of the state, and result in lasting injury to the common school system, must be admitted when thought is given to the religious sentiments and prejudices entertained by large numbers of our people that manifest themselves in many different forms of expression.

"One phase of this strong sectarian sentiment finds ample and wide-spread illustration in the well-known fact that there are thousands of good men and women who will not send their children to any school that is controlled by or under the influence of a denominational institution or church that teaches doctrines or indulges in forms of worship that do not meet their approval. To compose this uneasy spirit that was abroad in the land, to quiet the conscientious scruples of those justly opposed to forced contributions in aid of sectarian institutions, and save the common school from denominational criticism and attack, the prohibition against the union of church and school found voice in the organic law, and its pronouncement must be scrupulously adhered to so that no parent anywhere in the state may have it to say, as did one of the plaintiffs in this case, that he would not patronize the common school in his neighborhood because it was under the control of religious body whose tenets or practices he could not accept.

"The common school, however humble its surroundings or deficient its curriculum, is the most valuable public institution in the state, and its efficiency and worth must not be impaired or destroyed by entangling it in denominational or sectarian alliances. As an independent, nonsectarian unit, it is en-

> titled to the sincere and energetic support of all the people of the state, as well as to the hearty good will of all classes, irrespective of their religious views or church affiliations, and this on account of the inestimable blessing it confers on thousands of girls and boys in affording them the only opportunity for acquiring an education that could come within their reach; and if it is to live and grow in usefulness and strength, as it will surely do, the spirit of the Constitution must pervade its life and leave no man to say it has lost its carefully builded and jealously protected undenominational and nonsectarian character. This school system derives its support from the communicants of all churches, without being subservient to any of them, and its integrity and its safety depend on a strict adherence to the principle of separation of church and school, not only according to the letter, but to the spirit, of the Constitution.
>
> "Having these views, and to make clear and certain our determination to preserve the spirit of the Constitution in its efforts to keep separate church and school, we not only hold that it is a violation of the Constitution to appropriate any part of the common school fund, 'in aid of any church, sectarian or denominational school,' but equally unlawful for the trustees of any common or graded common school or educational institution, supported in whole or in part by public funds raised by taxation or dedicated to common school purposes, to enter into any contracts, agreements, or arrangements through or under which such school or educational institution may be brought directly or indirectly under the influence, control, or supervision of any denominational or sectarian institution or school."

An examination of the cases leads us to the conclusion that the weight of authority is to the effect that a contract between a state, county, city, school district or other political subdivision and a sectarian institution, whereby the former agrees to pay the latter for services rendered or expenditures incurred thereunder, is within the meaning of the

constitutional provision inhibiting the use of public funds in aid of sectarian institutions and void.

In the instant case the claim for tuition by St. Rita's is not even supported by a contract with the board of directors of the school district, and we are therefore of the opinion that payment of tuition to the parochial school of school funds would be within the meaning of Article XI, Section 11, of the Missouri Constitution prohibiting the use of public funds in aid of sectarian institutions and void.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

DRUGS: A person may not use the word "drugs" in his business or advertisement unless he be a licensed pharmacist.

December 22, 1936.

FILED 46

Hon. A. H. Juergensmeyer,
Prosecuting Attorney,
Warrenton, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion under date of December 17th, wherein you state as follows:

II.

"A owns and operates a news stand and confectionary and has put in a supply of patent medicines. Is he allowed to use in his advertisement and on his letterheads the word 'drugs?'"

Section 13140, R. S. Mo. 1929, provides in part as follows:

"It shall be unlawful for any person not licensed as a pharmacist within the meaning of this chapter to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding or dispensing of any drugs, medicines, chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, * * * *: Provided, however, that nothing in this section shall be so construed as to apply to the sale of patent and proprietary medicines, * * * *."

Under the above section, a person can not conduct a "drug" store or keep "drugs" exposed for sale unless he be a licensed pharmacist. Patent medicines, however, are an exception and may be sold at other than drug stores.

Section 13154, R. S. Mo. 1929, provides as follows:

> "It shall be unlawful for any person not legally licensed as a pharmacist to take, use or exhibit the title of pharmacist, or licensed or registered pharmacist, or the title druggist or apothecary, or any other title or description of like import; and it shall be unlawful for any person not legally licensed as an assistant pharmacist to take, use or exhibit the title of assistant pharmacist or any other title or description of like import."

To use or display the word "drugs " would be tantamount to the use or display of the word "druggist" for both would indicate that A was a dealer in drugs.

In the case of State v. Chipp, 121 Mo. App. 556, l. c. 559, the court said:

> " * * * defendant contends that a dealer in drugs and a druggist mean the same thing--that the terms are synonymous. For the purpose of the case, we will assume that defendant's contention is correct, of which we have no doubt."

We are of the opinion that, although A may sell patent medicines without being a licensed pharmacist, by placing the word "drugs" in his advertisement and on his letterheads he intends to convey to the public that he is a druggist, and thus violates Section 13154, supra.

Yours very truly,

WM. ORR SAWYERS,
Assistant Attorney General.

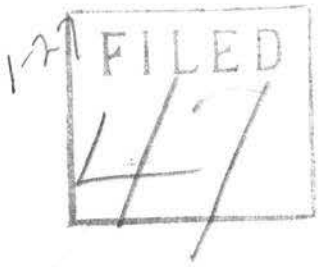
APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

COUNTY BUDGET ACT: Special tax levy of .07 authorized by section 7891 is not to be included in the term revenue as used in the Budget Act.

January 21, 1936.



Honorable O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

This department is in receipt of your letter of January 8, 1936, wherein you present a question involving the funds for taxes levied for special road and bridge purposes as they may be affected by the County Budget Act. Your letter is as follows:

> "The County Clerk, has asked me to obtain an opinion from your office on the following question.
>
> "Should a tax levied for a special purpose such as a .07 levy for road and bridge purposes, be budgeted under the County Budget Law of 1933? Is it to be considered as a County Revenue and budgeted as other revenue?
>
> "I will thank you for your opinion on this question."

In 1933 the Legislature passed what is termed the County Budget Act. The first eight sections are applicable to counties of the population of Montgomery County. Under Section 1, page 340 of the Act, we find the following provision:

> "Whenever the term revenue is used in this act it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this act regardless of the source from which derived."

Another provision is as follows:

> "The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year."

Under Section 2, page 341, the County Court has the duty of classifying proposed expenditures in five different definite classes within a reserve to be placed into class six.

Under Section 4, page 343, under the classifications of "Estimated Receipts" is the following:

> "Estimated from taxes for ordinary revenue for current year.
>
> "Other revenue (each source shall be stated separately) estimated.
>
> "Total estimated county revenue for the current year from all sources."

In classifying the proposed expenditures and the current revenue of the county for any one year, the repair and upkeep of roads is not mentioned by the Legislature. Class 3 is as follows:

> "The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

Section 9874 R. S. Mo. 1929, which was expressly repealed by the County Budget Act, contained the following provision relating to roads and bridges:

> "II. A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of such county."

Thus it will be noted that the repairing and upkeep of roads and bridges was formerly contained in one class of the county revenue, prior to the passage of the County Budget Act, but the County Budget Act refers only to the repair and upkeep of bridges and contains no class or provision relating to the repair and upkeep of roads. Therefore, we are confronted with the question of what is included in the expression used by the Legislature, namely: "for the current expenses of the county as is provided by this act regardless of the source from which derived."

Section 9867, R. S. Mo. 1929, is as follows:

> "The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

Section 9986, R. S. Mo. 1929, related to the division of the county revenue, but said section was expressly repealed by the Legislature in enacting the County Budget Act.

Relating to current county expenditures, the court in the case of State v. St. Louis-San Francisco Ry. Co., 247 S. W. 182, l. c. 184, said:

> "The revenue collected to pay past indebtedness must be applied to that purpose and may not be apportioned under section 12866 for current county expenditures. State ex rel. v. Hortsman, 149 Mo. 290, 297, 50 S. W. 811. Current county expenditures mean expenditures for the year for which the taxes were levied. State ex rel. v. Payne, 151 Mo. 663, 673, 52 S. W. 412. The only tax that a county court

> may levy on its own initiative is that for the payment of county current expenditures, as authorized by section 12859, R. S. No other tax for any purpose shall be assessed, levied, or collected, except as authorized by section 12860. In this case the additional 10-cent levy was made by the order of the circuit judge in vacation."

Under Section 7890, R. S. Mo. 1929, whibh is as follows:

> "The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'

it is the duty of the County Court to levy a tax of not more than twenty cents on the one hundred dollar valuation as a road tax, and the same shall be paid into the county treasury as other revenue. Section 7891, R. S. Mo. 1929, is the section under which your county has levied the tax of .07, and is known as the special road and bridge tax, said section being as follows:

> "In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county. Provided,

> however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court.

The Supreme Court in the case of State ex rel. v. Wabash Ry. Co. 319 Mo. 302, said:

> "The levy provided by section 7890, R. S. Mo. 1929, is a levy for county purposes within the meaning of section 9873 and the 10% restriction as to increased applies. The levy authorized by section 7891 is no part of the county levy, and the

restriction of section 9873 as to a levy that will produce revenue in excess of 10% of that received the previous year does not apply."

CONCLUSION

We are of the opinion that the revenue derived from a tax levied under section 7891, and revenue raised by similar methods, or in the same catagory, is not subject to the terms of the County Budget Act, and it is not incumbent upon the County Court to include the same in qualifying the expenditures of a county for any one year.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

OWN:H

SCHOOL FUNDS: Property sold to satisfy school fund mortgages, when securities are insolvent should be handled as outlined in Sec. 9256, R.S. Mo. 1929.

3-2

February 28, 1936.

FILED
47

Honorable Roy L. Kay,
Prosecuting Attorney,
Moniteau County,
California, Missouri.

Dear Sir:

This department is in receipt of your letter of February 8 in which you request an opinion relating to school fund mortgages. Your letter is as follows:

> "Moniteau County, like a great many other counties, during the time when land was high and the average citizen could raise several hundred dollars, made school loans on real estate. Since then, the Court has had to close out several of the loans made by advertising under the school fund mortgages, and the land sold did not bring the amount of the loan. Also, the securities have become insolvent, and a judgment against them would be valueless. In this case would you advise the spending of money to get a judgment which can not be collected?
>
> "The sureties on these bonds have not taken the bankrupt law nor made an assignment for the benefit of creditors, yet the court knows fully that their exemptions would more than consume their entire estates.
>
> "In the event you should hold that a suit would, under the circumstances, be useless, how would you advise the court to meet such situation?"

It has always been the duty of the county court with respect to school funds to guard the same zealously, using extreme care in making loans. Section 9250, R.S. Mo. 1929 specifies the rate of interest that may be exacted on school fund loans, and Section 9251 permits the county court to make loans only on lands which are free from encumbrances, the land to be of a value double the amount of the loan; it addition, it requires a bond to be given, usually by two citizens of the county who must own property assessed in an amount equal to the loan.

Section 9253, R.S. Mo. 1929 authorizes the county court to require additional security from time to time.

It appears from your letter that the county court of your county has exacted from the mortgagors proper bonds, but has never exacted any additional security. However, we assume that your county, like many other counties, has been subjected to the devaluation of land during the depression, bringing misfortune to many of its citizens, and as a result the loans exceed the value of the land in many instances.

Section 9256, R.S. Mo. 1929 authorizes the county to become a purchaser or bidder when land is foreclosed under a school fund mortgage, and is as follows:

> "Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid

> may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

CONCLUSION

In view of the fact, as stated in your letter, that the sureties on the bonds to your actual knowledge are insolvent and a judgment would not be availing in the way of obtaining additional funds, and that a deficiency judgment would be valueless, it is our opinion that Section 9256, supra, giving the county court power to repossess property by purchase, was designed primarily to take care of such a situation as you have outlined.

We are of the opinion that there is no liability on members of the county court providing they have done all in their power to preserve the school funds and there is no evidence of fraud, if the deficits are not reduced to judgment.

As to advice to the court in meeting the situation, it is our opinion that the county court should follow the provisions of Section 9256, supra, especially that portion of said section which states "but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools".

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CO. SUPERINTENDENT OF SCHOOLS: section 9467 permits county superintendent to receive not to exceed one-fourth of the annual salary as traveling expenses and clerical hire, or not more than $3.00 for each teacher under his jurisdiction. If county Sup't. does not claim full amount as actual expenses, he cannot afterwards claim offset by county against him for alleged unlawful salary and fees. If county sup't. has not claimed all actual expenses, he may do so at any time during the year.

December 31, 1936.

FILED
47

Honorable J.P. Kay,
County Sup't. of Schools,
California, Missouri.

Dear Sir:

This department is in receipt of your letter requesting an opinion based on the recent audit of your accounts in Moniteau County. Your letter is as follows:

> "The County audit has muddled things no little in our county. The auditor changed my salary in the middle of the year. My term starts July 1, yet the auditor started the decrease in salary on January 1, which makes a split salary for one year.
>
> "The audit shows that I owe the County $96.95 and the same audit shows that for the same two years of the audit that under Section 9467 I had not claimed $142.00.
>
> "Each and every year I visit my schools four times and I travel 10,000 miles and more. This at 4 cents per mile would have used up my lawful amount and more. The Auditor said that this could be adjusted with the court, but now that the court is also under the whip of the audit, they refuse to do anything.
>
> "My brother is also under the audit and people would say if he advised the court that we were framing them, so I appeal to you to send me or the county court an opinion on which to settle.
>
> "My tenure of office since I was elected shows that I have failed by $2635.37 to claim all that was allowed me by Section 9467, yet the audit shows that I am a grand rascal.

"Our court meets the last days of this month for settlement. I would thank you for an early reply. I am doing this of my own accord because my brother is attorney for the county."

You do not state in your letter as to what years the audit of your office covers, but you do state "My term starts July 1, yet the auditor started the decrease in salary on January 1, which makes a split salary for one year."

On October 11, 1933, this department rendered an opinion to Honorable Lee Mullins, Prosecuting Attorney, Rock Port, Missouri, holding to the effect that Sections 9463 and 9465, R.S. Mo. 1929 became effective on July 24, 1933. This was due to the fact that the method of arriving at the population of the various counties was based on the decennial census. A copy of this opinion is herewith enclosed.

As stated above, we do not know the reason for the auditor starting the audit of your office as of January 1 but we think it more than possible it should have been started in July. The question of annual salaries is discussed in the case of State ex rel. Harvey v. Linville, 318 Mo. 698, wherein the Court said (l.c. 702):

"Section 10938, Revised Statutes 1909, provides for ascertaining the 'annual' salary. Section 11352, Revised Statutes 1919, says that the superintendent shall receive so much money, dependent upon the population of the county, without saying whether it was per annum. From the context it must be presumed that annual salary was meant. 'Annual salary' as used in said Section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual' as applied to salaries means not the calendar years but the years of the incumbent's term, which in the case of relator, begins on the first day of April each year.

"Under Section 11354, enacted in 1919, the relator's salary would be determined by the vote cast at the last Presidential election, which

> was in 1916. The vote for that year was 3183, which multiplied by five would give a population of 15,915. At the presidential election of 1920, the vote was 4915, which multiplied by five would give a population of 24,575. By the provisions of Section 11352, the Superintendent of Schools received a salary, in counties having a population of 15,000 and less than 18,000, of $1350 per annum; and in counties of 24,000 and less than 27,000, a salary of $1800 per annum. Thus, if the annual salary means salary for the unbroken year he should have received $2700 for the first two years, and $3600 for the second two years; a total of $6300. He received $1350 annually for the entire four years, or $5400; leaving a balance due of $900."

We next proceed to your statement that the audit shows you owe the county $96.95 "and the same audit shows that for the same two years of the audit that under Section 9467 I had not claimed $142.00." You further state that "each and every year I visit my schools four times and I travel 10,000 miles and more. This at 4¢ per mile would have used up my lawful amount and more. The Auditor said that this could be adjusted with the court * * * My tenure of office since I was elected shows that I have failed by $2635.37 to claim all that was allowed me by Section 9467"

Section 9467, R.S. Mo. 1929 provides:

> "That the county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent. of his annual salary for traveling expenses and necessary clerical assistance. Provided such allowance shall not exceed three dollars ($3.00) annually for every teacher under his jurisdiction. The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire, draw a warrant upon the county treasury for the payment of same: Provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be four cents per

mile for each mile actually and
necessarily traveled."

The above section has never been before the Supreme Court for construction. Therefore, it becomes necessary for us to apply the usual rules of construing a statute. In no event can your traveling expenses and necessary clerical expenses exceed one-fourth of your annual salary--in fact, it may be less if that amount is not ascertainable by allowing $3.00 for each teacher under your jurisdiction.

You assign no reason for not having claimed the sum of $142.00 for the two years covering the audit. The statute does not allow you the above stated sum as a matter of course. It recites "The county court shall, upon presentation of his bill properly setting forth his actual expenditures for traveling expenses and clerical hire * * *" Therefore, if each month or each year, you claimed all of the actual expenditures for traveling expenses and clerical hire, then you would not as a matter of course be entitled to the balance of $142.00.

The same would apply to your mileage. You do not state whether you are claiming the $142.00 for the reason that you actually expended the same for clerical hire or expenses or were entitled to expend the same and did not do so. Assuming that you actually expended for clerical hire and traveling expenses the sum of $142.00 but placed no claim with the County for the same, can you now claim it as an off-set against the amount found due the County by the audit, to-wit $96.95?

Section 9466, R.S. Mo. 1929, which refers to counties of greater population than Moniteau County, permits the Superintendents of such counties a certain sum for clerical help and traveling expenses but states "and the county court shall, on the first Monday in each calendar month, order a warrant on the county treasurer in favor of the county superintendent of public schools for the proportionate amount then due and the same shall be paid by the county treasurer out of the county revenue funds".

Section 9467, R.S. Mo. 1929, which applies to counties of the population of your county, does not state when you shall present your account for clerical hire and traveling expenses. It may be that the statute contemplates monthly, semi-annual or annual accounts. Irrespective of the time you should present the account to the County, we think you are entitled to the amount actually expended during the course of a year for traveling expenses and clerical hire.

The question of whether or not you have actually expended the same is a question of fact which must be determined by you and the county court. Traveling expenses and clerical hire being part

of the emoluments of your office, we do not think you have waived the same by failure to file with the County Court an account of the actual expenditures, as the doctrine of estoppal and waiver is not applicable to a county officer claiming back salary. State ex rel. Summers v. Hamilton, 279 S.W. 33. On the other hand, if you have claimed all of the amount you actually expended in traveling expenses and clerical hire, we are of the opinion, as a matter of course, you could not claim the balance as Section 9467, R.S. Mo. 1929 confines you to actual expenses for traveling expenses and clerical hire.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:AH

CIRCUIT CLERK: Not entitled to retain drainage tax fees under Sec. 10879 in addition to maximum amount of fees he is entitled to retain under Sec. 11786, R.S. Mo. 1929.

March 9, 1936.

FILED
48

Hon. J.H. Kennedy,
Circuit Clerk,
Grundy County,
Trenton, Missouri.

Dear Sir:

This department is in receipt of your letter of February 29 wherein you make the following inquiry relating to the fees of the circuit clerk in drainage tax suits:

> "We would like to know if the clerk of the Circuit Court is entitled to retain clerk's fees in drainage tax suits.
>
> "Under section 10879, R.S. 1929, it seems that the clerk is entitled to these fees in addition to his salary and change of venue fees."

Section 10879, R.S. Mo. 1929, mentioned in your letter, provides:

> "The county and circuit clerks, except as limited in section 10878 and otherwise specified in statutes governing the organization and administration of drainage and levee districts, shall receive (in addition to the fees and deputy hire allowed under the provisions of Section 11811, R.S. 1929) for filing each paper relating to a drainage or levee district, five cents; for issuing each subpoena, summons or notice and for approving and filing each bond, twenty-five cents; for recording or copying each one hundred words and numbers, eight cents, any

> number consisting of more than three figures to be considered as two numbers. The fees of the sheriffs and witnesses shall be the same as allowed in section 10878 of this article."

In 1933 the Legislature repealed Section 11786, R.S. Mo. 1929 and enacted in lieu thereof a section by the same number, the pertinent part of which is as follows: (Laws 1933, p. 369)

> "The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * * "

The remainder of the section classifies the counties according to population and permits the circuit clerk to retain not to exceed a definite amount of fees. The only proviso in the nature of an exception is: "Provided further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties."

Section 11814, Laws of Missouri, 1933, p. 372, relates to the report of fees which it is the duty of clerks of courts of record to render, and the pertinent part is as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by section 11776. * * * * "

Bearing in mind that in Section 11786 (Laws of Mo. 1933, p. 369) the Legislature has said "The aggregate amount of fees that any clerk of the Circuit Court * * * shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out", and the proviso containing the exception of change of venue fees, and the words in Section 11814 (Laws of Mo. 1933, p. 372) "or any other statute", we are of the opinion that it was the intention of the Legislature for the Circuit Clerk to only retain the maximum amount of fees as set out in Section 11786, and must account for the fees as provided in Section 10879, and that same is an accountable fee.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

TAXATION: Procedure of Collector after third sale--
Four propositions.

November 25, 1936

FILED
48

Honorable Wm. C. Kerckhoff
Collector of Revenue
Jefferson County
Hillsboro, Missouri

Dear Sir:

This office is in receipt of your request for an opinion as follows:

> "Please pardon me for bothering you again. But I am not clear on the Tax Sales. I am enclosing you one of my tax bills which has been offered for the 3rd time for sale, and I have no bid on it at all. And then I have some which dates back to 1929 where I have only $1.00 and some $2.00 bids. Now if there is only a bid for $1.00 how many years taxes does this pay for? Does it pay down to the year of 1933? Because the 1934 and 1935 was not on the tax bill for the first time of advertising or does it pay for all down to 1935? If so, how many years of this bill do I have to carry on my back tax books in order if the owner should redeem this property within two years. If I have no bid how many years do I leave off of the back tax book next year? Do I leave off of the back tax book next year? Do I leave it all off down to the year of 1935 or only to 1933, because

the 1934 and 1935 was not advertised for the 3rd time? * * * * * * * * * *

"Now suppose Tom Jones bids for Bill No. 277 like I have enclosed. Will I put on his certificate all years from 1929 to 1935 inclusive, or only to 1933?"

I.

Bid at third sale is for then existing delinquent taxes.

Section 9952, page 429, Laws of Missouri, 1933, provides for the making of the delinquent list of lands and lots which is the basis for the publication provided for in Section 9952b, page 403, Laws of Missouri, 1935. This section calls for a list of lands and lots returned and remaining delinquent for taxes

> "describing such lands and lots as the same are described in the tax books * * * and charging them with the amount of delinquent tax, and naming the years delinquent separately stated * * * ".

It is quite evident that this list of delinquent lands and lots takes the place of the back tax book and is the warrant to the county collector for the collection of delinquent taxes. Therefore, this list must be complete in that it is to include all taxes which are delinquent. Section 9952b supra, provides in part:

> "The county collector shall cause a copy of such list of delinquent lands and lots to be printed. * *".

thereby further indicating that such list is to include all taxes which are delinquent against any given tract of land. Section

9952c, page 431, Laws of Missouri, 1933, provides in part as follows:

> "On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue the same from day to day until so much of each part and parcel assessed or belonging to each person assessed shall be sold as to pay the taxes, interest and charges thereon, or charged to such person in said county. * * *"

You will note that by this provision the certificate of purchase is offered and is to be sold to pay "the taxes, interest and charges thereon," indicating and meaning the total amount of charges which are against the tract of land. However, that section deals solely with the first sale. Section 9953, page 432, refers to the second sale. In the event that no person shall bid the sum equal to the delinquent taxes against the tract at the first sale a recital thereof shall be entered in the sale book and the delinquent lands offered again at the next sale, if they be at that time delinquent. The section then provides:

> "If at the second offering for sale no person shall bid thereof a sum equal to then delinquent taxes thereon with interest, penalty and cost, then the clerk of the sale shall note such fact * * * * *."

By this provision, it is definitely indicated that at the second sale the certificate is to be offered for the "then" existing taxes. Section 9953a, page 432, Laws of Missouri, 1933, reads as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county

> for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Taking into consideration all of these sections, it is quite certain that the intent of the legislature was that upon the third sale the tract would be offered for all of the delinquent taxes "thereon," with interest, penalty and cost provided by law, and that in the event the property did not bring the amount of such taxes, penalty, interest and costs on the third sale the same could be sold for whatever sum the tract would bring.

CONCLUSION

It is therefore the opinion of this office that in the event the tracts of land were offered for the third time this November and the taxes itemized in the advertisement from 1929 until 1935, (a premise assumed from your communication) that the amount bid on such third sale would be for the taxes for all those designated years, and in the event there was no redemption by the property owner, the land and lots would be discharged from such taxes upon full compliance by the purchaser with the other provisions of the law.

II.

Collector to carry balance of taxes on back tax book if property redeemed from third sale.

Your communication is not very definite concerning this question but we presume that you desire to know what back taxes you carry over in your back tax book as a lien on the property in the event the owner redeemed the property from a third sale at which the bid was not sufficient to pay the full amount of taxes, penalty, interest and cost charged against the tract. This inquiry is determined by Section 9953b, page 432, Laws of Missouri, 1933, which reads as follows:

> "Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemed from delinquent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

You will note from the last phrases of this section that in the event the land is redeemed from the third sale, which sale was not for an amount sufficient to pay all taxes, penalties, interest and costs against the tract, then the collector on the next or any subsequent tax sale shall again offer the land for the balance of such delinquent taxes, penalties, interest and costs. Therefore, in the event there was a redemption from a third sax sale of this character, it appears that the legislature intended that you should carry the balance of such taxes as a charge or lien against the property for which the property was to be sold at the next or any subsequent sale. Under usual rules of construction any sum which you received should be applied to the oldest taxes which are existing against the tract. For instance, you have taxes for 1929, 30, 31, 32, 33, 34 and 35 against a given tract. The amount bid at the third sale is sufficient to pay all of the 1929 taxes, with penalties and interest, and half of the 1930 taxes. In the case this was redeemed by the owner, you would then place upon your list of delinquent lands the balance due on the 1930 taxes, to-

gether with the taxes due for 1931, 32, 33, 34 and 35, and at the next sale after the owner had redeemed the property from the prior sale the land would be offered for sale for all of these taxes, plus any later taxes which might be delinquent.

CONCLUSION

It is therefore the opinion of this office that in the event there is a redemption from the third sale at which sale a bid was not received sufficient to pay all the taxes, penalties, interest and costs, then it is the duty of the county collector at the next or any subsequent tax sale to offer the tract or the certificate of purchase thereon for the balance of such taxes, penalties, interest and costs which were not paid at the prior sale.

III.

Outlawed taxes are not a charge against property for subsequent sale.

The sections hereinbefore cited indicate that each years taxes assessed against the property are to be included in the list of delinquent lands and lots and that such list is the basis for the publication of sale. Accordingly, if at the third sale no offer whatsoever is received by the collector, the law making no provision for a fourth sale, it would appear that those taxes, which at the next sale will be more than five years delinquent, are not a charge against the property which can be enforced under the provisions of the Jones-Munger law. In this connection, we refer you to Section 9961, page 405, Laws of Missouri, 1935. By virtue of this section, a statute of limitations is operative as to all taxes, initial proceedings for the sale of which have not been instituted within five years of the date of the proposed sale. It is our view that after a third sale is had on a given tract of land without a sale at such offering, the advertisement for sale, published the next succeeding year, constitutes the initial proceeding contemplated by Section 9961 supra.

CONCLUSION

It is therefore the opinion of this office that at the next sale of lands and lots for delinquent taxes, following a sale at which the tract or lot of land has been offered for the third time without any bid, you should offer the certificate of purchase on such lot or tract of land for all taxes which are not outlawed, to-wit, which did not become delinquent more than five years prior to the date of such proposed sale.

IV.

Certificate of purchase to bear the years of delinquent taxes for which land is sold.

Under point one of this opinion, it has been determined that the land should have been advertised and sold for all the delinquent taxes existing against the tract at the time of the sale. Such being the case, it necessarily follows that the certificate of purchase will bear all the years for which the taxes were delinquent. This is so by virtue of the provisions of Section 9953d, page 433, Laws of Missouri, 1933, which provides the contents of the certificate of purchase, and states in part:

> "* * * *the total amount of the tax, with penalty, interest and cost, and the year or years of delinquency for which said land or lots were sold, separately stated, * * * * *".

Therefore, the answer to your illustration suggested in your communication is that on Bill No. 277, such as you have enclosed, which itemizes the taxes from 1929 to 1935, inclusive, and assuming that your advertisement set forth each of these years, your certificate of purchase should designate all of these years as being the taxes delinquent for which the land or lot was sold.

CONCLUSION

It is therefore the opinion of this office that, if the property has been sold for the delinquent taxes existing against the tract or lot at the time of the sale, following the advertisement, the certificate of purchase should by virtue of Section 9953d, page 433, Laws of Missouri, 1933, state each and every year for which such delinquent taxes were due, it being assumed that the land was not advertised or sold for outlawed taxes.

Respectfully submitted,

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:RT
Enc.

SCHOOL DISTRICTS: When warrants may be issued on anticipated revenues.

4-29

April 24, 1936.

FILED
49

Hon. Lloyd King,
State Superintendent of Schools,
Jefferson City, Missouri.

Attention: Mr. N. E. Viles, Director
School Building Service.

Dear Sir:

We acknowledge receipt of your request for an official opinion under date of April 10, as follows:

> "Section 9357 R. S. Mo. 1929 provides that state aid amounting to $2,000 shall be paid a school district which erects a new building, when certain conditions are met by the district. This money is due the district when the building is approved by the State Superintendent of Schools.
>
> "The Laclede School District has underway a building for which plans and specifications have been approved. The building will be approved for state aid. May we have your opinion on the following question?
>
> "May a district consider the state aid as anticipated funds as soon as the building is completed and issue warrants thereon to pay the contractor and other obligations against the district for the building?"

Section 9357, R. S. of Mo. 1929, provides when state aid is granted a district for a high school, as follows:

> "Whenever a district organized under the provisions of this article has secured a site of not less than five acres for the central high school building of said district and has erected thereon a school building, suitable for a central school and containing one large assembly room for the meeting of the citizens of the district and has installed a modern system of heating and ventilating, the state shall pay one-fourth of the cost of said building and equipment: Provided the amount thus paid by the state shall not exceed two thousand ($2,000.00) for any one district. The state of Missouri shall, out of the general revenue fund of the state, make adequate appropriation for carrying out the provisions of this section and the money due any district shall be remitted by the auditor to the county treasurer of the proper county on receipt of a certificate from the state superintendent of public schools stating that the conditions herein prescribed has been complied with."

By virtue of the above section, it becomes the duty of the State Auditor to pay to the County Treasurer of the proper county one-fourth of the cost of the high school building and equipment, not exceeding two thousand dollars ($2,000.00) for any one district, upon receipt of a certificate from the State Superintendent of Schools stating that the conditions prescribed in the above section have been complied with.

In pursuance of the above section, the Legislature made the following appropriation out of the general revenue fund of the state (Laws of Missouri, 1935, Section 56, page 113):

> "There is hereby appropriated out of the State Treasury chargeable to the general revenue fund, the sum of Twenty-Five Thousand Dollars ($25,000.00) for the purpose of carrying into effect the provisions of Section 9357 of the Revised Statutes of Missouri, 1929, which provide State aid for high school buildings in certain school districts."

Section 12 of Article X of the Constitution of Missouri provides in part as follows:

> "No county, city, town, township, school district, or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year."

Section 9233, R. S. of Mo. 1929, provides how school moneys are applied, thus:

> "All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants issued by order of the board to legally qualified teachers for services rendered according to law. No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following; nor shall any portion of the funds mentioned in this section be applied in payment of any teacher's warrant issued prior to the distribution of such funds in accordance with section 9257, and no school warrant shall bear interest."

Section 9233, supra, leaves no doubt but that the board of directors is prohibited from drawing warrants on the treasurer unless there is money on hand in the various school funds out of which same can be paid. However, assuming that all of the conditions prescribed in Section 9357, supra, have been complied with and the State Superintendent of Public Schools has issued a certificate to the State Auditor to that effect, can the district consider same as anticipated revenue for the year in which the approval was given and issue warrants thereon to pay the contractor and other obligations against the district for the building?

In the case of Jacquemin & Shenker v. Andrews, 40 Mo. App. 507, l. c. 510, the court said:

> "The allegation is that they caused an order to be drawn on the county treasurer

for teacher's wages, when they knew there was then no money in that fund. It is not alleged that there did not afterwards, during that school year, come into the teacher's fund moneys from the state, county or district, out of which said warrant could be paid, so that there was no provision made to meet it. We take it, that, while the board of directors were, by the implication of the statute, prohibited from drawing said warrant on the treasury, unless there was money on hand of that fund, out of which it could be paid, still this prohibition must not be construed so as to preclude the directors from anticipating this fund, if the amount of their warrant could subsequently be paid out of any money coming into the county treasury for that school year, from either or all of the three sources from which that fund, by law, is derived.

"The provisions of the school law must be construed liberally so as to give them a practical effect. It might have been that the collection of the amount of the estimate of the annual meeting, for carrying on the school for that year, was delayed for some reason or that the income into the teachers' fund from the state or county may have been delayed, by reason of the default or miscarriage of some officer intrusted by law with the collection or disbursement of this fund, and thus it may have been prevented from reaching the county treasury at the proper time. We cannot think a warrant drawn upon the county treasury, under such circumstances when there was no fund then on hand to pay it, would hardly be deemed illegal or unauthorized."

From the foregoing, we are of the opinion that, assuming that all the conditions prescribed in Section 9357, supra, have been complied with, and the State Superintendent

of Public Schools has issued a certificate to the State Auditor to that effect, the district may consider same as anticipated revenue for the year in which the approval was given and issue warrants thereon to pay the contractor and other obligations against the district for the building.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

COSMETOLOGY: The Board of Health for its power to make rules and regulations governing examination of applicants, can charge applicants a fee of $1.00 for the rental of equipment necessary for said examination in addition to the regular examination fee of $10.00 as provided under Section 9094, R. S. Mo. 1929

July 23, 1936.

7-23

FILED 49

Mrs. Nellie L. Killion, Director
Division of Cosmetology & Hairdressing
Jefferson City, Missouri

Dear Madam:

You recently consulted this department in person and submitted the form of notice of examinations and instructions to applicants for our consideration.

It appears that this department, on July 10, 1936, rendered an opinion to Honorable D. A. Pollard, Member of the House of Representatives of the 58th General Assembly, at Calhoun, Missouri, in which it was held in substance that the State Board of Health could only charge the fees enumerated in the statutes, and that, if the statutes did not provide for additional fees, the Board could not exact additional fees; and it further held in substance that Section 9094, R. S. Mo. 1929, provided that the examination fee of $10.00 was the only fee which the Board could exact from the applicant desiring to take the examination.

In view of this decision, you desire our opinion as to the legality of Instruction No. 4, which is as follows:

> "Be prepared to pay one dollar ($1.00) for use of cosmetics, towels and other service furnished by the school."

You appear to be familiar with the provisions of Sections 9094, 9095, 9096, 9098 and 9106, R. S. Mo. 1929, which were contdined in the opinion rendered to Mr. Pollard and relied on as authority for the conclusion contained in that opinion. In addition, however, we respectfully refer you to Section 9097, R. S. Mo. 1929, which is as follows:

> "The examination of applicants for certificates to practice under this article shall be conducted under the rules prescribed by said state board of health and shall include both practical demonstrations and written and oral tests in reference to the practices for which a license

is applied for and such related studies and subjects as the state board of health may determine necessary for the proper and efficient performance of such practices and shall not be confined to any specific system or method, and such examinations shall be consistent with the practical and theoretical requirements of the classified occupation or occupations as provided by this article."

By the above quoted section, the board of health prescribes rules for the examination of applicants. Therefore, under the instructions to applicants, number 4 may be treated as a rule prescribed by the State Board of Health. By careful reading of Rule No. 4, it appears that the $1.00 fee exacted from the applicants is for the use of certain articles. From your explanation of the examination of the applicants, it is necessary to conduct said examination by the use of not only cosmetics, towels, etc. but also facial chairs, permanent wave machines, manicure tables and other electrical equipment. We assume that, in all probability, no applicant possesses such equipment and articles necessary for conducting the examination; hence, it becomes necessary for the board, in order that said applicant can be thoroughly tested as to the applicant's qualifications, to rent such articles. The $1.00 fee in question then becomes a rental fee necessary for the applicant, and for the applicant's own use, instead of a fee exacted by the board as the $10.00 fee mentioned in Section 9094.

Under Section 9106, R. S. Mo. 1929, the fees for examination and certificate, as provided in this article, are to be paid in advance to the Secretary of the State Board of Health and by him, each month, paid into the state treasury to the credit of the general revenue fund. By your explanation of the matter, the $1.00 fee exacted from the applicant for the rental of numerous articles necessary in the examination of applicant, is paid to the School of Cosmetology or other persons having such equipment for rent and does not become a part of the regular fees for examination which must be paid into the State Treasury.

We are therefore of the opinion that Rule No. 4, made by the Board for exacting a rental fee in addition to the $10.00 fee mentioned in Section 9094, supra, is a legal fee and the same can be exacted under the rules and regulations permitted

by the Board under Section 9097, R. S. Mo. 1929, and our opinion to Mr. Pollard of July 10th is overruled to that extent.

Respectfully submitted,

OLLIVER NOLEN
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

SCHOOLS: Section 9357, R. S. 1929, and Section 19, Laws of Mo. 1931, page 346, provide building aid to certain districts and allow participation in both.

August 27, 1936.

8-27

FILED
49

Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Mr. King:

We are in receipt of your letter wherein you inquired:

> "Please advise this Department concerning the relation of Section 9357, R. S., 1929, and Section 19, Laws of 1931, p. 346, for granting state aid to schools when school buildings are erected. Wherein does the granting of building aid under one law limit or prohibit the granting of aid under the other?"

Section 9357, R. S. Mo. 1929, reads as follows:

> "Whenever a district organized under the provisions of this article has secured a site of not less than five acres for the central high school building of said district and has erected thereon a school building, suitable for a central school and containing one large assembly room for the meeting of the citizens of the district and has installed a modern system of heating and ventilating, the state shall pay one-fourth of the cost of said building and equipment: Provided the amount thus paid by the state shall not exceed two thousand ($2,000.00) for any one district. The state of Missouri shall, out of the general revenue fund of the state, make adequate

> appropriation for carrying out the provisions of this section and the money due any district shall be remitted by the auditor to the county treasurer of the proper county on receipt of a certificate from the state superintendent of public schools stating that the conditions herein prescribed has been complied with."

Section 19, Laws of Missouri, 1931, page 346, reads as follows:

> "There shall be paid to any consolidated or enlarged school district in which a new school building has been erected in accordance with plans approved by the state superintendent of schools, the sum of $1,000.00 for each school building abandoned on account of such new building. This amount shall be paid in the same manner as other state apportionment aid and at the time of the next annual apportionment following the opening of school in the new building and the abandonment of the school building or buildings: Provided, however, that any consolidated district receiving building aid under the provisions of this section shall not receive building aid under section 9357, and such districts as elect to receive building aid under said section 9357 shall not be entitled to aid under this section."

Section 9357 was enacted by the General Assembly in 1913 (Laws of Mo. 1913, page 724) and in the 1919 revision was placed in Article 4, Chapter 102 relating to "Laws applicable to city, town and consolidated schools." Section 9357 is a state aid to a district when it erects a central high school building according to certain specifications and contains a modern system of heating and ventilating. The State obligated itself to pay one-fourth of the cost of said building provided

that said one-fourth did not exceed $2,000.00 for any one district. Section 9357 is clearly an aid to the district and once received no further aid can be granted under said section. See our opinion dated August 30, 1935, to Honorable L. O. Gillihan, Prosecuting Attorney, Daviess County.

In 1931 the Legislature enacted Section 19, which is also a state building aid to consolidated or enlarged school districts. A consolidated or enlarged school district does not receive the aid provided for by section 19 unless buildings are abandoned because of the erection of new buildings. Nowhere in Section 19 are the words "central high school building" used, nor is it mandatory that the new school building be a central high school building. It could be an elementary school building. While Section 19 contains the following proviso:

> "Provided, however, that any consolidated district receiving building aid under the provisions of this section shall not receive building aid under section 9357, and such districts as elect to receive building aid under said section 9357 shall not be entitled to aid under this section.";

yet, we do not believe that the Legislature intended to make the aid granted by virtue of Section 9357 and the aid granted by Section 19, to be separate and distinct aids to the extent that the receiving at one time the aid provided in one section, barred the receiving at a later time the aid provided in the other section. We believe that the above proviso merely incorporated Section 9357 into and made it a part of Section 19 for the reasons stated in State ex rel. School District of Kansas City v. Lee, 66 S. W. (2d) 521. In said case the Supreme Court of Missouri, en banc, had under consideration the proviso found in Section 13. The court ruled as follows (p. 523):

> "Thereafter, and immediately following said last-named provision, it is provided in said section 13 as follows: 'Provided, that special state aid shall continue to be apportioned as now or hereafter provided by sections 9220, 9223 and/or 9431 Revised Statutes 1929.'

"The district contends that the special aid provided in section 9220 (Mo. St. Ann. Sec. 9220, p. 7089) is excepted from the provisions of the act of 1931 by the above-quoted clause. The superintendent contends that by reference section 9220 is incorporated into, and made a part of, said act.

"We are inclined to the view of the superintendent. The mere use of the word 'provided' does not convert the words following into a 'proviso' in the strict legal sense. The word may be used in the conjunctive sense. Castilo et al. v. State Highway Commission, 312 Mo. 244, loc. cit. 269, 279 S. W. 673. We think it was so used and that the Legislature intended by said clause to incorporate section 9220 into and make it a part of said act. The rule is stated by a standard text as follows: 'Statutes which refer to other statutes and make them applicable to the subject of the legislation are called "reference statutes." Their object is to incorporate into the act of which they are a part the provisions of other statutes by reference and adoption. Reference statutes are of frequent use to avoid encumbering the statute books by unnecessary repetition and they have frequently been recognized as an approved method of legislation, in the absence of constitutional restrictions.' 25 R. C. L. p. 907."

A district having received aid under Section 9357 for the erection of a central high school building could never again receive aid under that section. However, the receiving aid under Section 9357 would not, in our opinion, bar the district from receiving aid for abandonment of school houses by virtue of Section 19. The aid under Section 9357 is for the erection of a central high school building, while the aid provided for by Section 19 is for the abandonment of school buildings by the erection of a new building. If a district desires to erect

a central high school building and abandon four or five other school buildings, such could exercise an option and take under Section 19 or could take under Section 9357. And if a school district exercised its option and took under Section 9357 it could not receive aid under Section 19 for the same purpose. However, a school district could erect a central high school building and receive aid under Section 9357 and then in the future erect a new building and abandon an old building and yet receive aid under Section 19, in our opinion.

It is our further opinion that while Section 9357 bars a district from participating in said aid only the one time, or until it receives the maximum amount of $2,000.00, yet, it could participate in the aid provided for in Section 19 as many times as it erects a new building and abandons old buildings, provided such district does not participate in the two aids at the same time.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

ELECTIONS: A person legally qualified as a voter and able to read and write may act as a judge of election (except candidate) in counties the size of Livingston County.

October 20, 1936.



F I L E D

49

Honorable Randall R. Kitt
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This is to acknowledge your telegram dated October 19, 1936, as follows:

> "I wish you would please send me an opinion on the following question can anyone employed on or the foreman on a federal works progress administration project or anyone employed by or holding an office under the United States the State of Missouri a county or a municipality serve as a judge of election at the General Election. Please send me this opinion at the earliest possible moment."

Section 10207, R. S. Mo. 1929, provides for the qualifications of judges of election and is as follows:

> "No person shall be qualified to act as a judge or clerk of any election unless he shall be legally entitled to vote at such election, and shall moreover be able to read and write."

You will note the above section only provides two qualifications for the judges of election, namely: (1) That

such person shall be legally entitled to vote at such election, and (2) that such person shall be able to read and write. No other limitation is placed on such persons.

Section 2, Article VIII of the Constitution of Missouri relates to who are entitled to vote, and reads as follows:

> "All citizens of the United States, including occupants of soldiers and sailors' homes, over the age of twenty-one years who have resided in this State one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Nowhere do we find any Missouri case or any statute which prohibits an employee or a foreman of a Federal Works Progress Administration project from acting as a judge of election, or the employment by or the holding of an office under the United States, the State of Missouri, a county, or municipality, barring such person or persons from acting as judges or clerks of election in counties such as Livingston County. Section 10209, R. S. Mo. 1929.

We are further of the opinion that the appointment of such persons, if they were appointed as judges of election, would not be violative of the public policy of the State of Missouri.

You have not asked the question, but suffice it to say that a person who is a candidate for office could not be a judge of election as it would be violative of public policy.

It is our opinion that if a person (other than a candidate) is a legally qualified voter and is able to read and write, that such person may act as judge of election, so far as Missouri is concerned, in Livingston County, whether he be employed by or holds a job as foreman of a Federal Works Progress Administration project, or an office under the United States or the State of Missouri or the county or the municipality.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

JLH:EG

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

COUNTY COURTS: Limits on borrowing money cannot exceed reasonably anticipated revenues for the year without a bond issue approved by the people.

November 13, 1936.

FILED
49

Hon. A. P. Kidder,
Presiding Judge,
Nodaway County Court,
Maryville, Missouri.

Dear Sir:

We have received your letter of November 10th, 1936, which is as follows:

> "Some time ago a W. P. A. project was turned in as a County wide project for building and repairing necessary roads and bridges in Nodaway County. This project seems to have met with the approval of the local, St. Joseph, and Jefferson City offices, but in order to comply with the requirements, it will be necessary for Nodaway County to finance same to the extent of thirty-five to forty-five thousand dollars. Our Road and Bridge budget is used up on other roads. Our local attorneys tell us there is no way that they know of that the County Court could finance this project. Would you kindly give us your opinion in regard to this matter."

Attached to your letter is a letter from the Citizens State Bank of Maryville, Missouri.

We construe your letter to mean that your county for the present year has no funds available and unused arising from either your county revenue, your road and bridge revenue, or your special road and bridge revenue. Your question then is, does the county court have authority to borrow money or contract other debts this year for the purpose of assisting to the extent of from thirty-five to forty-five thousand dollars in the road project, the expense of which will in part be borne by federal funds, in completing a county-wide W. P. A. project.

Section 12 of Article X of the Missouri Constitution, in part, provides as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose."

In the case of Holloway to use v. Howell County, 240 Mo. 601, the court, in discussing the authority of a county to go in debt, uses the following language, l. c. 613:

> "The theory of our present system of county government is that counties must run their business affairs on the 'cash system'. * * * Running in debt is easy and pleasant while it lasts. Paying is 'another story'. The pleasure of debt making is denied by law to Missouri counties; they can anticipate their revenue, but only for the current year."

In the case of Watson v. Kerr, 279 S. W. 692, speaking on the same subject, the court said, l. c. 695:

> "But, in construing the constitutional provision just quoted, we have repeatedly held that an indebtedness is not invalid merely because it appears at the end of the year in which it was created that the aggregate indebtedness incurred by the county during that year exceeded the revenue actually collected. If, at the time of its creation, the indebtedness is within the income which may reasonably be anticipated, it is valid."

In the case of Hawkins v. Cox, 334 Mo. 640, the court, in speaking of this same constitutional provision, said, l. c. 649:

> "The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar)

> year the income and revenue provided for such year,' but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in Book v. Earl, 87 Mo. 246, where the court said: 'The contracting of a debt in the future by a county in any manner or for any purpose in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters' is prohibited."

It may be appropriate here to point out that there are recent cases in this state under the authority of which bridges have been built and other W. P. A. projects carried out by issuing bonds payable solely out of the revenues arising from those projects, but those cases are not in point on the matter you inquire about because there is no collection of revenue from a county-wide road system, and therefore this project could in no event be self-liquidating.

In the case of Trask v. Livingston County, 210 Mo. 582, l. c. 594, speaking about whether the indebtedness was created for the building of a bridge at the time of the letting of the contract or at some other time, the court said:

> "Hence, the indebtedness for these bridges was created, if at all, by a compliance with the law governing the letting and contracting for bridges already noted. When the county became indebted on these bridge contracts must be determined by the 'income and revenue provided for such year,' which under the Constitution must be looked to for the payment of such indebtedness and it was the 'income and revenue provided' for the year 1889, which the county court was authorized to appropriate for that purpose, and not the revenue for the year 1890, which at the date of the contract for the building of said bridges had never been assessed, levied or collected."

In construing the above constitutional provision the Supreme Court of this state has, we think, clearly held that a county can not in a given year create a debt against the county revenues in excess of the revenues on hand and the reasonably anticipated revenues for that year. Likewise, the rule is announced

that if the county goes beyond the above limit, the contract is void. In the case of Barnard & Company v. Knox County, 105 Mo. 382, l. c. 390, the Supreme Court said:

> "It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such surface view of the matter. The Constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves, to take notice of the limit prescribed by the Constitution. * * * Soliciting agents, contractors and others who deal with county officials must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. Unless this is so, there is an end to all effort to bring about an economical and honest administration of county affairs."

Under the state of facts set forth in your inquiry as above interpreted, your county proposes to borrow this money at a bank, and the law as declared in the above expressions of the court in defining the rights and powers of county courts would be violated.

This opinion is limited to a discussion of whether borrowing this money violates the law pertaining to the authority of the county court to contract debts beyond the reasonably anticipated revenues of the county for the current year.

We have in mind the fact that it is commendable on the part of county officials to improve their county road system and to join in these W. P. A. projects, thereby not only improving their road system but furnishing employment for many people who need such employment, but it is our duty to construe the law as we find it, and when the law as written does not authorize the county court to so engage in such effort, it is a proper question to submit to the Legislature, who have the authority to change such law if in their wisdom they think best to do so.

CONCLUSION

It is our opinion that a county can not in a given year create a debt against the county revenues in excess of the revenues on hand and the reasonably anticipated revenues for that year, and that under the state of facts as above set forth your county would be violating this rule if it borrowed the money above set forth and thereby attempted to obligate the county to that extent, even though the money were spent for a worthy and commendable cause. If the county had no authority to enter into such a contract of borrowing, the attempted contract would be void, and we know of no way for the county to presently avail itself of additional cash except by a bond issue approved by the vote of the people.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:HR

SCHOOLS: General Assembly may provide gratuitous instruction for persons under 6 years of age and also for persons over 20 years of age, and such would not violate the Constitution of Missouri.

December 15, 1936.

12-22

FILED
49

Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Mr. King:

This is to acknowledge your letter as follows:

> "I shall appreciate having an official opinion on the following question:
>
> "Under the Constitution of Missouri, may the General Assembly authorize boards of education to provide for gratuitous instruction for persons under six years of age and also for persons over twenty years of age?"

The Constitution of the State of Missouri does not grant power to the Legislature but is a limitation on legislative power so that the Legislature may enact any law not expressly or impliedly prohibited by the Constitution of Missouri or of the United States.

In Ludlow-Saylor Wire Co. v. Wollbrinck, 205 S. W. 196, the Supreme Court of Missouri, en banc, said the following concerning the Constitution of Missouri (page 197):

> "The government of this state is a representative republic, in which all the power to make laws in the

> name and with the authority of its constituent elements--its citizens en masse--is lodged in the temporary Legislature, subject only to the restraining clauses of the Constitutions of the state and nation. Upon this principle is founded the inherent power of that body to legislate at will on any subject and to any extent when, in so doing, neither the state nor the national Constitution is overridden."(Cases cited.)

Article XI, of the Constitution of Missouri relates to "education." Section 1 of said article reads as follows:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

The above constitutional provision makes it mandatory upon the General Assembly to establish and maintain free public schools for persons between the ages of six and twenty years. When the Legislature establishes schools for persons between six and twenty years of age it complies with the Constitution. However, the Legislature is not limited to establish schools for persons between six and twenty years but may provide schools for gratuitous instruction for persons under six years of age and also for persons over twenty years of age, owing to the fact that the Legislature is unlimited unless restrained by the Constitution. Section 1, Article XI does not restrain the Legislature to the establishment of schools for gratuitious instruction of only persons between six and twenty years of age, but makes it mandatory that at least gratuitious instruction be granted to persons between six and twenty years of age.

The Legislature has established public schools giving gratuitous instruction for persons between six and twenty years of age and in maintaining said schools biennially appropriates moneys from the State Treasury for their support. Section 6 of Article XI, Constitution of Missouri, provides in part as follows:

> "The proceeds of all lands * * *; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools * * * *, and for no other uses or purposes whatsoever."

Section 7 of Article XI, of the Constitution of Missouri, provides in part as follows:

> "* * * * the general Assembly may provide * * * *; but in no case shall there be set apart less than twenty-five per cent of the State revenue, exclusive of the interest and sinking fund, to be applied annually to the support of the public schools. "

In State ex rel. Gass v. Gordon, 266 Mo. 394, the Supreme Court of Missouri, en banc, construed the words "ordinary revenue" as found in Section 6, Article XI of the Constitution of Missouri, as follows (page 411):

> "The regular and usual annual income of the State, however derived, which is subject to appropriation for general public uses."

In the above case the court called attention to the fact that from 1877 till 1887 the Legislature appropriated

one-fourth of the ordinary state revenue paid into the treasury to the schools, and from 1887 until the present time one-third of the ordinary revenue has been given for the support of free public schools. The 58th General Assembly appropriated one-third of the ordinary state revenue for the support of the free public schools. Laws of Missouri, 1935, page 9. You will therefore note that the Legislature is not limited as to the amount it may appropriate, just so it is not less than twenty-five percent, owing to Section 7, Article XI of the Constitution.

Persons between the ages of five and six and over twenty years of age may at the present time receive gratuitous education just so long as the ordinary revenue, as described in Section 6, Article XI of the Constitution, is not used for the furtherance of such gratuitous education. Section 9213, R. S. Mo. 1929, provides in part as follows;

> "The board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district. * * * * *"

None of the ordinary revenue as described in Section 6 of Article XI of the Constitution, can be used for any purpose other than giving of gratuitous instruction for persons between the ages of six and twenty years.

In Roach v. The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, the St. Louis Court of Appeals said (p. 488):

> "As to the second point, we think differently. The provisions of the 1st and 6th sections of article 11 of the constitution of the State, taken together, are conclusive on this point. The 1st section in effect declares that all persons in the State between the ages of six and twenty shall be gratuitously

> instructed in the free public schools therein provided for, and the 6th section in like manner declares that the 'public school fund,' therein mentioned, shall be faithfully appropriated for establishing and maintaining the 'free public schools' provided for in said article, and for no other uses or purposes whatsoever. The two sections, taken together, amount to both a requirement and a prohibition. By the first, free public schools for the gratuitous instruction of all persons in the State between the ages of six and twenty are required, but by the sixth, the funds thus dedicated to that use are prohibited from being expended for any other uses or purposes whatsoever. The expenditure by the defendant of its revenues for the purpose of admitting and instructing in said schools children under the age of six years, is a use of its funds not authorizied, but forbidden, by the constitution, * * * * * * "

It is to be noted that the General Assembly may establish gratuitous instruction for persons under six years of age and also for persons over twenty years of age, but the one-third revenue now dedicated to the use of gratuitous instruction of persons between six and twenty years of age could not be used for the purpose of giving gratuitous instruction to persons under six and over twenty years of age. Roach v. The Board of President and Directors of the St. Louis Public Schools, supra; Kayser v. Board of Education, 201 S. W. 531.

It is our opinion that the General Assembly may, under the Constitution of Missouri "authorize boards of education to provide for gratuitous instruction for persons under six years of age and also for persons over twenty years of age" just so long as Section 6, Article XI, of the Constitution

is not violated, i. e., in reference to the one-third revenue set apart for the support of public schools.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney-General

JLH:EG

SCHOOLS: Postage may be purchased from the appropriation to teacher-training if such postage is used in the inspection and supervision of teacher-training.

December 31, 1936.

12-31

FILED
49

Honorable Lloyd W. King
State Superintendent
Department of Public Schools
Jefferson City, Missouri

Dear Mr. King:

This is to acknowledge your letter as follows:

> "This Department needs money to buy postage for work in supervision of teacher-training high schools in this state. At this time, we have on hand sufficient money in the appropriation for the purchase of the necessary postage.
>
> "Would it be proper for this Department to purchase stamps from the appropriation made for high school teacher-training as provided in Section 9405, R. S., 1929?"

Article 7, Chapter 57, relates to "Special State Aid for High Schools and Teacher-Training Courses." Section 9405 of said article and chapter provides in part as follows:

> "The appropriation provided for the instruction of pupils in the science and practice of rural school teaching and the teaching of elementary agriculture, may be expended in part for the inspection and supervision of such instruction by the state superintendent of public schools * * * * and the expense of such inspection and

> supervision shall be paid out of said appropriation on vouchers certified by the state superintendent of public schools."

The 58th General Assembly appropriated moneys for teacher-training in high schools for the biennium 1935 and 1936. Section 57, Laws of Missouri, 1935, page 113, reads as follows:

> "Teachers Training in high schools. --There is hereby appropriated out of the State Treasury chargeable to the general revenue fund, the sum of Thirty-Five Thousand Dollars ($35,000.00), for the purpose of carrying into effect the provisions of Article VII, Chapter 57, of the Revised Statutes of Missouri, 1929, which provides for teacher-training work in high schools, provided, however, in the event the funds appropriated herein are insufficient to pay the apportionment in full as provided by law; they shall be pro-rated to schools in pro-rata proportion."

You will note that $35,000.00 has been appropriated for the express purpose of carrying into effect the provisions of Article 7, Chapter 57, supra. Section 9405 provides that the appropriation for teacher-training may be expended in part for the inspection and supervision of such instruction. No doubt it becomes necessary to use postage for inspection and supervision. Suffice it to say that moneys should only be expended for postage when the postage is used in furtherance of teacher-training. In other words, postage should not be purchased from the appropriation for teacher-training if such postage is to be used in carrying out other functions of your Department.

The Supreme Court of Missouri, en banc, in State v. Thompson et al., 85 S. W. (2d) 595, had before it for

determination a question similar to the one you present. The court held that moneys could be expended from the teacher-training appropriation for supervision and inspection if such related to teacher-training. However, if the expenditure of the appropriation does not relate to teacher-training, as to inspection and supervision, then any money expended from the appropriation would be illegal. The court said (p. 601):

> "Under the application of the doctrine enunciated above, the inclusion in printing bill C (count 3 of the petition) of the items admittedly having no connection with teachers' training was an obvious and inexcusable error, while all other items in suit were properly for the determination of the trial judge."

From the above it is our opinion that if postage is needed and used for work in inspection and supervision of teacher-training high schools that such may be purchased from the appropriation found at page 113, Section 57, Laws of Missouri, 1935. However, the postage must be used in the furtherance of teacher-training.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

JLH:EG

OLD AGE PENSIONS: State Board not relieved from liability to pay funeral expenses of deceased pensioner because he carried policy of insurance in the amount of $108.00 payable to his wife.

July 28, 1936

9-30

FILED
50

Mrs. Kate Ray Kuhn
Member County Old Age Assistance Board
Marion County
Hannibal, Missouri

Dear Madam:

This will acknowledge receipt of your letter requesting an opinion from this department, which reads as follows:

> "We would like to request an opinion on the case of an applicant for Old Age Assistance.
>
> "This applicant, who applied through the Marion County Board, has been certified and received the Assistance up until a few days ago when he passed away.
>
> "He had an insurance policy amounting to about one hundred and eight dollars ($108.00) made out to his wife.
>
> "As you know, the State allows fifty dollars, ($50.00) for burial fee to an applicant where there is no estate, if the case has been certified. This man had no estate, personal property amounting to about ten dollars ($10.00) and nothing else beside the insurance.
>
> "He and his wife have been on relief for two or three years and the house rent has been donated by a friend.
>
> "The wife now has absolutely nothing and will have to go back on Direct Relief.
>
> "We wonder if it would be possible for this applicant's wife to receive the burial fee granted by the State under

the circumstances.

"Will you, please, advise me at your earliest convenience?"

Section 15 of the Old Age Assistance Act, Laws of Missouri 1935, page 312, provides:

> "On the death of any person receiving old age assistance,such reasonable funeral expenses for burial shall be paid to such persons as the state board directs; provided, that such expenses do not exceed $100.00 and the estate of the deceased is insufficient to defray the same."

You ask if it would be possible for this applicant's wife to receive the burial fee granted by the State in the instant case. You will note,from the above section,that the funeral expenses are to be paid to such persons as the State Board directs if the expenses do not exceed one hundred dollars and the estate of the deceased is insufficient to defray the same. We presume that what you desire to know is whether the State should pay burial expenses in the case in question, in spite of the fact that the deceased pensioner had an insurance policy payable to his wife in the amount of $108.00. You do not state whether the policy in question is an old line life insurance policy or a fraternal benefit policy. If it is a policy in an old line life insurance company the proceeds thereof would inure to the wife's separate benefit, independent of the creditors, executors and administrators of the husband, under the provisions of Section 5739, Revised Statutes Missouri 1929, and would not be subject to the payment of funeral expenses. Said section reads, in part:

> "Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person,expressed to be for the benefit of the wife of the insured,shall inure to her separate benefit, independently of the creditors, executors and administrators of the husband: * * * * "

If the policy was one of a fraternal beneficiary association the proceeds thereof would belong, absolutely, to the beneficiary and would not be subject to the payment of funeral expenses, under the provisions of Section 6011, Revised Statutes Missouri 1929, which reads as follows:

> "No money or other benefit,charity or relief or aid to be paid,provided or rendered by any such society shall be liable to attachment, garnishment, or other process or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary,or any other person who may have a right thereunder, either before or after payment."

Even if the policy in question was made payable to the estate of the deceased the widow would be entitled thereto under the stated facts in your letter. Under the provisions of Section 107, Revised Statutes Missouri 1929, a widow is entitled, in addition to dower, to certain articles of property and such sums of money in exclusion of all its claims, charges, legacies and bequests as the Court may deem reasonable for the proper support of said widow for the period of one year after the death of the decedent. In addition thereto, the widow is allowed not to exceed the appraised value of four hundred dollars, under the provisions of Section 108, Revised Statutes Missouri 1929, and if the widow does not receive the property thus allowed the court shall order the money to be paid to the widow as her absolute property. The one year's allowance and the four hundred dollars provided for above is the absolute property of the widow and is not subject to the payment of any debts.

It is, therefore, the opinion of this department that the fact that a deceased pensioner had a policy of insurance payable to his wife,in the amount of $108.00,would not relieve the State Board's liability to pay the reasonable funeral expenses for burial to such persons as the State Board directs, if such expenses do not exceed one hundred

dollars and the estate of the deceased is insufficient to defray the same.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

LD AGE ASSISTANCE: Applicant may appeal to the Circuit Court from th decision of the State Board as to amount of assis allowed

072

3-20

March 11, 1936.

FILED
57

Mr. C.E. Larkins, Vice Chairman,
Buchanan County Old Age Assistance Board,
Room 26, Court House,
St. Joseph, Missouri.

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this Department, which reads as follows:

> "It is the contention of the Chairman of this Board that an applicant has no right of appeal to the Circuit Court on the action of the State Board except as to his or her property or income, residential or other qualifications, to receive the benefits of this Act, and may not appeal from the decision of the Board as to the amount of allowance in each case.
>
> "We would appreciate an early opinion by your office in this matter as we have a large number of applicants who are much dissatisfied with the allowance in their case, and we desire to give them the proper information as to how to proceed."

Section 10 of the Old Age Assistance Act provides:

> "Whenever an application is made for old age assistance, the county board shall promptly make investigation of the facts, and after hearing the applicant, if it

> approves the application, shall make a recommednation of the amount of assistance to be allowed, or, if it disapprove, make a recommendation that no assistance be allowed. Upon the request of an applicant, the county board may, if it sees fit, direct a rehearing, of which the applicant shall have at least ten days' notice, and at which he may appear and offer evidence. The decision of the county board shall be forwarded to the State Commissioner who may approve or disapprove, or recommend changes in the decision of the county board. If the State Commissioner and the county board are unable to agree in regard to the allowance, disallowance, or the amount of assistance, the application, along with a record of all the proceedings in regard to it, shall be forwarded to the State Board for review, whose decision shall be final, subject to the right of appeal as herein otherwise provided.
> * * * * "

An applicant's right to appeal to the Circuit Court from the action of the State Board is found in Sec. 25 of the Act, which said section reads as follows:

> "Any person claiming the benefits of this Act who is aggrieved by the action of the State Board as to his or her property or income, residential or other qualifications to receive the benefits of the Act may appeal from its decision to the circuit court of his or her judicial circuit within ninety days from the decision complained of, by giving the State Board notice of such appeal; such appeal shall be had and tried in the circuit court de novo as appeals from decisions of justices of the peace, and the judgment rendered thereupon shall be final; and if such judgment be in favor of the appellant a certified copy of same shall be mailed to the State Board."

The amount of assistance that a person is entitled to by reason of the provisions of the Old Age Assistance Act is determined according to Section 5 of said Act "with due regard to the conditions in each case"; in other words, the amount of assistance is necessarily determined by reference to the applicant's "property or income, residential or other qualifications".

CONCLUSION

It is the opinion of this department that an applicant for Old Age Assistance may appeal to the Circuit Court from the decision of the State Board as to the amount of assistance allowed him for the reason that in reality an appeal for this reason is an appeal predicated upon the alleged wrongful action of the State Board as to the applicant's "property or income, residential, or other qualifications".

If such an appeal be taken, the matter must be determined in the Circuit Court de novo as appeals from the decisions of justices of the peace, and the judgment rendered thereupon shall be final.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

PENAL INSTITUTIONS: Commissioners may not make lump sum allowances for extraordinary services performed by employe, over and above fixed salary.

December 31, 1936.

FILED
51

G. H. Lane
Commissioners of Department of
Penal Institutions,
Jefferson City, Missouri.

Gentlemen:

This is to acknowledge receipt of letter dated December 7, 1936, addressed to your Board, written by the Secretary and Assistant Secretary at the State Penitentiary, in which you orally request the opinion of this Department on the matters set forth in their letter to you. We deem it unnecessary to set forth in detail the matters contained in their letter, but suffice it to say it sets forth additional and special services which they alleged were performed at the Penitentiary in caring for and looking after financial matters of convicts and looking after and caring for the "Earnings Fund" at the Penitentiary. It is further stated in said letter that they have not received any Holidays or vacations during their tenure in office.

The request for opinion, as we understand it is whether or not they may be granted, namely, the Secretary $350.00 and the Assistant Secretary $250.00, for extra services over a period of three and one-half years, in addition to their regular salaries as fixed or agreed upon by the Board.

Section 8394, R. S. Mo. 1929, provides specifically for certain officers and their salaries at the Penitentiary and then further in said section this language is used:

> "* * * All other officers and employes shall receive such compensation as may be agreed upon between them and said board. All salaries shall be paid in

> monthly installments. The board shall make a pay roll containing the names of every officer and employe, with the amount due each, which shall be kept at the peniten - tiary and a certified copy thereof filed in the office of the State Auditor. Such salaries shall be paid out of the fund appropriated for the pay of civil officers: * *"

The above named Secretary and Assistant Secretary are not specifically named in said section and their salaries are not fixed therein, but the authority for their appointment is found in the above quoted portion of the section, and their compensation is such as may be agreed upon between them and said Board. We take it that the salaries paid the above officers have been agreed upon and fixed by the Board and each are receiving a certain monthly salary.

It is our opinion that the Board would not have authority to grant to the above officials the sums as stated above for extraordinary or special services performed by them.

It makes no difference how meritorious or just a claim for extra or additional services may seem, we do not think it is within the power and authority of the Board to grant same under the above circumstances. However, where the Board has a discretion in fixing the amount the officers or employes shall receive, as the Board does in this case, it may take such matters as stated above into consideration in fixing the salaries of said officers and employes.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

STATE BOARD OF EDUCATION: Duly authorized agency to receive Federal Social Security Funds for health work in Mo.

3-12

March 12, 1936.

FILED
52

Miss Katharine F. Lenroot,
U.S. Department of Labor,
Children's Bureau,
Washington, Missouri.

Dear Miss Lenroot:

This department is in receipt of your letter requesting an opinion as to the following state of facts:

> "You are familiar with the recent correspondence by letter and by telegraph between this office and yours with reference to the question of the State agency in Missouri which is authorized to receive Federal funds for administration, under title V of the Social Security Act. I have been advised that it is your opinion that the State Board of Education is constituted by law as the duly authorized agency for receiving and disbursing such funds on the request of that Department charged with immediate administration of the particular plans.
>
> "The Solicitor of Labor has asked for a copy of your opinion or opinions on this question. I should like further to ask you directly whether in the face of section 543 of the Act of March 18, 1933 and section 1 of the Act of May 2, 1933, the State Board of Education or any other state agency has the power to receive and to disburse Federal funds on the voucher of other State departments."

Section 1, Laws of Mo. 1933, p. 415, to which you refer in your letter, is not, in our opinion, pertinent to the question here under consideration, as that section has to do with fees, funds and moneys received by any department or board by virtue of any law, rule or regulation made in accordance with any laws of the State of Missouri, and does not apply to funds derived by devise, bequest, donation, gift or assignment.

Section 643, Laws of Mo. 1933, p. 252 provides:

> "Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the State Board of Education, as constituted by law, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor or assignor of said property and said officials constituting said Board, so that the right and title to shall pass to and vest in this State; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct. The intention of this act is to abolish the commission heretofore created to accept devises, bequests, donations, gifts or assignments of money, bonds or choses in action, or of any property, real, personal or mixed, and to transfer such duties to the State Board of Education."

It is this section of our laws that we deem to be pertinent to the situation here presented. It will be noticed that in this statute it is provided that "and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct". This is not a mandatory provision, however, and it is our opinion that the State Board of Education as constituted by law is the duly authorized state agency to receive the Federal Social Security Funds for health work in Missouri.

It is our further opinion that these funds should be accepted by the State Board of Education subject to the plan for maternal and child health in Missouri, and disbursed by said Board according to said plan.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

PUBLIC ADMINISTRATOR: Tenure of Office.

November 13, 1936. 11-13

FILED
53

Mr. Paul S. Limerick
Public Administrator
7814 Forsythe Blvd.
Clayton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated November 10, 1936, which reads as follows:

> "As you probably know I was successful in being elected to the office of Public Administrator in St. Louis County in the landslide last Tuesday. I suppose that I am not definitely in office, in the official opinion of the Attorney General, until I have become one of the official family by qualifying, but perhaps I can get some official data on this matter.
>
> "The incumbent, who is also a Democrat, wants to be relieved of his office as soon as possible, and I have not been able to find any reference in the statutes to the definite term of a Public Administrator. I assume that I can take over the duties of that office as soon as I receive my commission and take my oath and post my bond, but as far as any legal precedent is concerned I cannot find any. Will you be kind enough to give me your opinion on that by return mail, if it is not imposing upon you?
>
> "What I want to do is this, as soon as the official count is completed in the county I want to talk to

Jefferson City and obtain my commission from the Governor, and return immediately to take my oath and post my bond and take over the duties of that office without waiting for the first of the year. In your opinion would it be necessary for the incumbent to accompany me to the Governor's office to accomplish this purpose, or is it just as well that I see him alone?"

Section 296 R. S. Mo. 1929, provides:

"Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the Constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and the court may from time to time, as occasion shall require, demand additional security of such administrator, and, in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

Section 301 R. S. Mo. 1929, provides:

> "When a public administrator has been appointed to take charge of an estate, he shall continue the administration until finally settled, unless he resigns, dies, is removed for cause, or is discharged in the ordinary course of law as the administrator."

Article XIV, Section 5, of the Missouri Constitution provides:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

In the case of State ex rel. v. Kennedy, 73, Mo. App. 384, that Court said at l. c. 388:

> "We are of the opinion that the true meaning of the statute is that a public administrator continues to administer estates in his hands even after the expiration of his term of office, unless he dies, resigns his office, is removed, or is otherwise discharged according to law. In this case, as before stated, Kennedy resigned his office, his resignation was accepted by the governor and his successor appointed. He thereby became incapacitated to further administer estates in his hands and his duties devolved upon his successors. His functions as administrator ceased as effectively as if he had been removed from office. The express provision of the statute is that he shall continue the administration 'unless he resigns.' "

CONCLUSION.

There are no statutes or cases in Missouri which specify with particularity when the term of the office of public administrator shall commence. We construe Section 296, supra, to mean that after election, pursuant to the provisions of said section, the only formality necessary for said successful candidate to comply with is to take the prescribed oath and furnish the prescribed bond on or before the first day of January following said election. When this is done, then the successful candidate is ready to enter upon the duties of his office, and continues to hold office until his successor be elected and qualified.

It is true that the present public administrator of St. Louis County has the constitutional and statutory power to resign the duties of his office. When he so resigns, then he ceases to continue as administrator of all estates in his hands. His written resignation, presented to the Governor, is a sufficient resignation when accepted to alienate him from the office. Should he not resign then he continues to administer estates in his hands.

Yours very truly

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:H

CITIES:)
PUBLIC SERVICE COMMISSION:) Public Service Commission Act supersedes any contract between city and utility as to purity of water.

September 15, 1936. 9-15

FILED
54

Honorable Will C. Lohmeyer
Commissioner of Public Property and Public
Utilities of the City of Springfield
Springfield, Missouri

Dear Mr. Lohmeyer:

This is to acknowledge your letter requesting our opinion concerning the right of the City of Springfield to enforce the terms of Section 11, Ordinance No. 349, to the end that the City shall have the right to take over the present water works and operate same in order to adjust or correct the causes, if any, for complaint concerning the city water.

Section 11, appended to your letter, reads as follows:

> "When the city water works are completed and the City Clerk notified thereof, a test for assurance as herein set forth shall be made; then for the full term of this ordinance or extension thereof (except sooner purchased by said city) said Perkins or assigns shall continue to furnish without default a constant and uninterrupted supply of water as herein before set forth.
>
> "Provided for any neglectful default in operating and supplying water as aforesaid on the part of said Perkins or assigns. The city may take possession temporarily of said works, machinery and appurtenances and operate the same until insured that the works will be efficiently operated by the said Perkins or assigns, and the expense so incurred by the said city in so operating said works shall be

> a lien upon the earnings of said works until paid, and shall be deducted from any sum due said Perkins or assigns."

Assuming this ordinance, when entered into, to be valid and to constitute a valid and enforceable contract between Perkins or assigns and the City of Springfield, the question presents itself as to the validity of such contract subsequent to the passage of the Public Service Commission Act of 1913.

Chapter 33, R. S. Mo. 1929, relates to the "Public Service Commission," and Article 4 of said chapter to "water corporations." Section 5188 of said article and chapter provides in part as follows:

> "This article shall apply to * * * * * and the supplying and distributing of water for any purpose whatsoever."

Section 5190 provides in part as follows:

> "The commission shall: 1. Have general supervision of all * * * water corporations having authority under any special or general law or under any charter or franchise to lay down, * * * pipes, conduits, ducts or other fixtures in, over or under the streets * * * for the purpose of furnishing or distributing water * * *.
> 2. Investigate and ascertain, from time to time, the quality of * * * water supplied by persons, corporations * * *; examine or investigate the methods employed by such persons, * * * in supplying and distributing water for any purpose whatsoever, and have power to order such reasonable improvements as will best promote the public interest, preserve the public health and protect those using * * * water, and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements and extensions

> of the works, * * pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of * * * water corporations and municipalities.
> 3. Have power, by order, to fix from time to time standards for the measurement of the purity * * * of water to be distributed or sold by persons * * * for any purpose whatsoever * * * and for the purpose of determining whether the water furnished or sold conforms to the standard of purity and pressure, and conforms to the orders issued by the commission, the commission shall have power, of its own motion, to examine and investigate the plants and methods employed in manufacturing, delivering and supplying * * * * water."

This section of our laws delegates to the Public Service Commission all powers necessary to supervise and regulate water corporations such as the one supplying water to the City of Springfield. The fact that a contract, by way of ordinance or otherwise, existed between the City and the public utility, could not in any wise affect the right of the Public Service Commission to deal with the utility, regardless of the rights and liabilities created by said contract. This is best illustrated by the words of Judge Graves in the case of City of Cape Girardeau v. Railway Co., 305 Mo. 590, 267 S. W. 601:

> "The Public Service Commission is not a court and cannot undertake to either enforce or abrogate contracts. It deals with common carriers (by virtue of the written law) upon the theory of public service, and not in view of any contract. What contracts may have been made is not a real consideration of the Public Service Commission, under its limited authority, If a concrete case comes within its purview, the Commission is authorized to make orders (under the police power) which will best subserve the public welfare. <u>This is irrespective of contract rights.</u>"

And in the very recent case of State v. Public Service Commission of Missouri (1932), 50 S. W. (2d) 114, the court said:

> "A proper disposition of this case by this court lies within narrow compass. That it is within the powers and jurisdiction of the public service commission, under the powers granted that body by the Legislature, to grant to or withhold from a street railroad the right and power to abandon a part or spur of its existing line, has been repeatedly held by this court. Southwest Railroad Co. v. Public Service Commission, 281 Mo. 52, 219 S. W. 380; State ex rel. v. Missouri Southern R. R. Co., 279 Mo. 455, 214 S. W. 381; State ex rel. Carthage v. Public Service Commission, 303 Mo. 505, 260 S. W. 973; City of Cape Girardeau v. Railway Co., 305 Mo. 590, 267 S. W. 601, 36 A. L. R. 1488. The power of the Public Service Commission is an exercise of the police power of the state granted by the lawmaking power to that tribunal and overrides all contracts, privileges, franchises, charters or city ordinances. The exercise of such police powers are by the statutes granting same made subject to review and control by the courts as to being unreasonable or unlawful. The only question for the circuit court on the writ of review, and by this court on appeal, is whether the orders made by the Commission subserve the public welfare in a manner and to an extent reasonable and lawful, and this question is to be solved regardless of contract right or obligations, except as such enter into the reasonableness or lawfulness of the orders made. City of St. Louis v. Public Service Commission, 276 Mo. 509, 526, 207 S. W. 799."

CONCLUSION

Assuming the ordinance in question to be valid and to constitute a still existing contract between the water company and the City of Springfield, certain it is that the City of Springfield could not arbitrarily take possession of the water works. Whether or not there has been any neglectful default in supplying water by the water corporation, is necessarily a question of fact that would have to be determined by a court of law.

Assuming these facts, when finally determined, conclusively showed a neglectful default on the part of the water company, even then the City could take possession and operate the water works only until such time as the neglectful default existed. The default having been corrected, under the very terms of the ordinance, possession and control of the water works would have to be returned to the water company.

It is clear, therefore, that the whole purpose and intent of the ordinance when written was to assure to the people of Springfield a constant and safe supply of water. There was at that time no act similar to the Public Service Commission Act, and it is reasonable to assume that, had there been such an Act, this provision of the ordinance would have been omitted for there would then have been no reason or need for protection other than that guaranteed by the Public Service Commission Act.

It is therefore our opinion that the Public Service Commission Act of 1913 supersedes Section 11 of Ordinance No. 349, and that the proper remedy on the part of the City of Springfield, in case of any neglectful default on the part of the water company supplying water to the City of Springfield, is by way of complaint made to the Public Service Commission, as contemplated by Article IV, Chapter 33, supra.

Yours very truly,

APPROVED:

James L. HonnBostel
Assistant Attorney-General

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

BANKS & BANKING:) Persons seeking to incorporate, doing a
CORPORATIONS:) safety deposit box business, must comply with the provisions of Article 5, Chapter 34, R. S. Mo. 1929.

Opinion to Hewitt Co No. 364 Dated 1/4/36.

January 20, 1936.

1-23

FILED 56

Hon. Russell Maloney
Corporation Commissioner
Secretary of State
Jefferson City, Missouri

Dear Mr. Maloney:

This is to acknowledge your letter dated January 17, 1936, as follows:

"Re: University Safe Deposit Co.

"Find enclosed proposed articles of association of the above company purporting to be drawn under the provisions of Article 7, Chapter 32, Revised Statutes of Missouri, 1929, governing manufacturing and business companies which were submitted to this department and a charter certificate of incorporation was denied on the grounds that the proposed business purposes are only extended to corporations organized under the provisions of Article 5, Chapter 34, Revised Statutes of Missouri, 1929. In this connection call your attention to that part of Section 5496, Revised Statutes of Missouri, 1929, worded as follows:

"'and secondly, also, at its option, in connection therewith, for the purpose of taking and receiving as bailee for safe-keeping and storage only, jewelry, plate, money, specie, bullion, stocks, bonds securities and valuable papers of any kind, and other valuables, and guaranteeing their safety, upon such terms and for such compensation as may be agreed upon, and to let out vaults, safes and other receptacles for the uses, purposes and benefits of such corporation.'

> "Request for an opinion from your office as to whether or not the proposed business purposes of the enclosed articles properly come within the provisions of Article 7, Chapter 32, Revised Statutes of Missouri, 1929, is made for reason that we find of record in this department several Missouri corporations whose business purposes are those of a Safety Deposit Company and organized under the provisions governing business and manufacturing companies.
>
> "Upon inquiry of the State Finance Department we find that the said department has no record of a single Safety Deposit Company organized under the provisions of Article 5, Chapter 34, Revised Statutes of Missouri, 1929.
>
> "Kindly advise if the proposed business purposes of the enclosed articles should be placed under the provisions of Article 5, Chapter 34, Revised Statutes of Missouri, 1929."

As stated in your letter, the University Safe Deposit Company seeks to be incorporated under the provisions of Article 7, Chapter 32, Revised Statutes of Missouri, 1929; capital stock of said corporation was placed at $2000.00, of which $300.00 was subscribed and paid up in moneys of the United States, and the shareholders and board of directors consisting of three persons; said corporation was formed for the following purposes:

> "To erect, purchase, lease or otherwise acquire warehouses, storage houses and storerooms or any or all of them for the storage and safe keeping of goods, wares and merchandise, including jewelry, plate, money, specie, bullion, stocks, bonds, notes, mortgages and other securities and valuable papers, deeds, wills and all other kinds of personal property, and to take, receipt, keep and preserve as a

> bailee such property, or any other part thereof, for the respective owners thereof upon such terms and for such compensation as may be agreed upon, and to that end to purchase, construct, lease or otherwise acquire, hold and own such storage compartments, vaults, safes, boxes and such other property and applicances as may be necessary or proper for engaging in the business aforesaid or any part thereof; also to rent out vaults, safes and other receptacles for the uses, purposes and benefits of such corporation."

It will be noted that said corporation is formed for only one purpose, and that is to conduct a safety deposit box business.

Section 4940, found in Article 7, Chapter 32, R. S. Mo. 1929, provides in part as follows:

> "Corporations may be created under this article for any of the following purposes:
>
> * * * * * *
>
> "Thirteenth--For any other purpose intended for pecuniary profit, or gain not otherwise especially provided for, and not inconsistent with the Constitution and laws of this State: Provided, that nothing in this section shall be construed to authorize the incorporation of a bond investment company or association to issue bonds or debentures based upon payments upon the installment plan, nor any company which savors of the character of a trust company, bank, saving fund, building and loan or fiduciary company."

Article 5, Chapter 34, R. S. Mo., 1929, pertains to "Savings Banks and Safe Deposit Institutions." Section 5491 of said article and chapter provides in part as follows:

> "Any five or more persons who shall have associated themselves by articles of agreement, in writing, as provided by law for the purposes included under section 5496 of this article, may be incorporated under any name or title designating such business. * * * * *"

Section 5496, R. S. Mo. 1929, provides in part as follows:

> "Corporations may be created under this article: * * * * * * * * * *; and secondly, also, at its option, in connection therewith, for the purpose of taking and receiving as bailee for safe-keeping and storage only, jewelry, plate, money, specie, bullion, stocks, bonds, securities and valuable papers of any kind, and other valuables, and guaranteeing their safety, upon such terms and for such compensation as may be agreed upon; and to let out vaults, safes and other receptacles for the uses, purposes and benefits of such corporation. * * * * * *"

A reading of Article 5, Chapter 34, shows that a corporation desiring to do business as a safe deposit box institution must comply with the provisions of that article and chapter, and must record its articles of agreement in the office of the recorder of deeds and file a certified copy of such recorded instrument in the office of the Commissioner of Finance, and if said Commissioner finds that all the requirements of Article 5, Chapter 34, have been complied with, and upon payment of certain fees and charges, he issues his certificate which entitles said corporation to engage in the safe deposit box business.

Section 4940, supra, Paragraph 13, provides that a corporation may be formed and created under Article 7, Chapter 32 "For any other purpose intended for pecuniary profit, or gain not otherwise especially provided for."

We invite your attention to the words "not otherwise especially provided for."

A safe deposit institution is provided for in Section 5496, supra. The Supreme Court of Missouri, en banc, in State ex rel. Walker v. Corkins, 123 Mo. 56, l. c. 64, said the following:

> "The settled policy of the state to encourage the combination of capital, in lawful business enterprises, under corporate management, is apparent from the number of laws upon its statute books authorizing the creation and existence of corporations. * * * * The relation the business of some corporations bears to the public has made it necessary to impose special duties and restrictions upon them. Of these may be named railroad companies, insurance companies, and banks."

And further, page 66,

> "The primary object to be attained in the interpretation of statutes is to ascertain and give effect to the intention of the legislature; and this is to be determined upon a consideration of the entire act and the objects and purposes intended to be accomplished. The evident purpose of this article was to authorize in corporation for business purposes. The other articles of the chapter, and the first ten subdivisions of article eight, include only purposes which are not common, but are unusual and extraordinary, or such as require special powers and duties."

It is thus seen that Article 7, Chapter 32, R. S. Mo. 1929, specifically provides that no corporation can be created by virtue of said article and chapter if such savors of the character of a trust company, bank, et cetera, or is "not otherwise especially provided for." And Article 5, Chapter 34, specifically provides for a corporation to do business as a safe deposit box institution. A safe deposit box institution savors of the character of a savings bank and reposes a trust, i.e., bailee, upon the corporation seeking to do business as such.

From the above it is our opinion that a corporation, formed for the purpose of engaging in the safe deposit box business, must comply with Article 5, Chapter 34, R. S. Mo. 1929. It follows that the University Safe Deposit Company cannot incorporate under Article 7, Chapter 32, R. S. Mo., 1929.

We are returning herewith the Articles of Association, together with Cashier's Check in the amount of $54.50 payable to Richard R. Nacy, State Treasurer, appended to your letter.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG
Encs.

RIMINAL COSTS: In change of venue cases, where a cause is transferred from one county to another and a defendant is convicted in the latter county and sentenced to a term in the county jail, the expense and upkeep of such prisoners shall be borne by such county from whence the cause was transferred.

8/14

August 14, 1936.

FILED
56

Mr. Leonard Manze
Clerk of the County Court
Howell County
West Plains, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "In regard to collecting board bills of prisoners from other counties: A case comes to Howell County from another county on change of venue and the defendant is tried by a jury and found guilty and punishment assessed at imprisonment in the county jail for one year. The County Court sends the defendant to the county farm to serve out said sentence. This county allows 60¢ per day for feeding prisoners while in jail. The county also feeds them while on the farm. Can Howell County collect the 60¢ per day board bill from the other county the same as if he had been in jail all the time?"

Your attention is directed to Section 3846, R. S. Mo. 1929, relating to costs in cases wherein a change of venue has been granted. It reads as follows:

> "In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed

> in another county, and in which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted; and in all cases where fines are imposed upon conviction under such indictments or prosecutions, or penalties or forfeitures of penal bonds in criminal cases are collected by civil action or otherwise, payable to the county, such fines, penalties and forfeitures shall be paid into the treasury of the county where such indictment was originally found or such prosecution originally instituted, for the benefit of the public school fund of the county."

The above statute plainly states that, whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, the costs for the upkeep of said prisoner shall be borne by the county in which the indictment was originally found or the proceedings were originally instituted.

In the instant case, the costs for the upkeep of the defendant in your county shall be borne by the county from whence said defendant came.

CONCLUSION.

It is the opinion of this department that your county may collect the 60¢ per day board bill from the other county for the upkeep of said defendant.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

ELECTIONS: Right of County Central Committees to name candidates; must be known to be of same political faith.

September 30, 1936.

10-7

Hon. Wayne Maness,
County Clerk,
McDonald County,
Pineville, Missouri.

FILED
56

Dear Sir:

We acknowledge receipt of your letter of September 15, 1936, which is as follows:

> "J. T. Pinnell of Pineville, Missouri, has served as Prosecuting Attorney in McDonald County for a number of terms, was elected as a democrat in 1934, and now serving, during the last primary he filed as a candidate in the Democratic Primary, and was defeated nearly two to one by W. G. Tracy. As the Republican Party did not have a candidate in the Primary for the office of Prosecuting Attorney, the Republican Central Committee on Thursday August 27th, 1936, nominated J. T. Pinnell as their candidate.
>
> "Can this be done under the statutes governing elections, and will it be necessary for me to have his name printed on the ticket as a Republican Candidate for Prosecuting Attorney, in the general election.
>
> "He made a number of good democratic speeches in the primary campaign, but is now bitter against the New Deal.
>
> "Kindly furnish me with an opinion as soon as possible."

It appears that your question is, does the statute authorize the Republican Central Committee of McDonald County to fill a vacancy on the ticket for the office of Prosecuting Attorney when the Republican party had no candidate and nominated no person for such office in the Primary, and does it have authority to name as such Republican candidate the person who is the present Prosecuting Attorney and is holding such office as a Democrat, elected thereto on the Democratic ticket, and who was a candidate on the Democratic ticket at the recent Primary this year and was defeated as such?

The Republican Central Committee has only such authority as is conferred upon it by the statutes of this state, and such statutes conferring power upon the Central Committee should be strictly construed, as all power rests in the people except such as is expressly or by necessary implication taken away from them by the Legislature in exercising its right to speak for the people.

The Legislature has spoken on this question and in Section 10245, R. S. Mo. 1929, is this provision pertaining to the right of a county central committee to place candidates on the ticket at the general election:

> "Provided, that in case of any vacancy in said nomination, by resignation, death or otherwise, the central committee, or a convention called for that purpose, of the party on whose ticket such vacancy may occur, may select and certify to the * * * county clerk * * * the name or names of candidates to fill such vacancy."

This statute confers upon said Central Committee the authority to fill such a vacancy as the one in question, but Section 10246, R. S. Mo. 1929, defines the method by which this Central Committee must perform that duty, and one of the express provisions of this statute so defining and limiting the right or authority of such Central Committee to fill such vacancy is the provision

> "that no central committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted."

A cardinal rule of construction of statutes is to determine the intent of the Legislature when it enacted the same, and it seems to us that the reasonable view, and in fact the only view that the

Legislature could have entertained in expressing itself by this statute was to prevent just such occurrences as you state the Republican Central Committee of McDonald County contemplates.

Stating it another way, Section 10246 means that the Central Committee in filling a vacancy must name a person who is known to be a Republican if it is the Republican Central Committee filling such vacancy on the Republican ticket.

It is difficult for us to perceive a plainer state of facts than the one you mention as showing that the party whom the Republican Central Committee here seeks to place on its ticket is not of the same political faith, but, on the contrary, is of the opposite political faith. He not only has stamped on him the opposite political faith by the fact of his having heretofore declared that he was a democrat when he was elected on the Democratic ticket, and by the further fact that he is now and has been for amost two years holding office as a Democrat, but the further fact also proclaims from the housetops that he is a Democrat, such further fact being that he filed as a Democrat in the recent Primary and presumably paid the filing fee therefor, which goes to the Democratic party, and the further fact that he evidently solicited votes as a Democrat in the recent Primary.

It would not be a fair view of the law to say that with such a background as you set forth showing that the given individual has been a Democrat, running on the Democratic ticket, and holding office as a Democrat and drawing his salary as a Democrat, could now over night, and, so far as your question shows, without any declaration on his part to the contrary, be turned into a Republican by the mere placing of his name on the Republican ticket by the Republican Central Committee of your County as the Republican nominee.

This opinion is not written with a view of passing on the question of whether a vacancy exists where no one filed as a candidate before the Primary, and thereafter at the Primary election voters wrote in the name of someone as the candidate for an office. We do not here pass on that question, but it may be determined by a mandamus action in court.

CONCLUSION

It is our opinion that the Republican Central Committee of McDonald County has the authority to fill a vacancy on its ticket for the office of Prosecuting Attorney, but that in so doing it must name a person who is known to be of the Republican political belief and party, and that it has no authority to name as such candidate the person who is now the Democratic Prosecuting Attorney of the county and so functioning, and who ran on the Democratic ticket in the recent Primary.

The naming of this man by the Republican Central Committee being illegal, and it being your duty to observe the law, it is our further opinion that it will not be necessary for you to have his name printed on the ticket for use at the general election.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

ELECTIONS*---Absentee ballots to be printed thirty days before election.

ELECTIONS----Absentee ballots may be voted within thirty days of election.

INSANE-------Relatives may transport to hospital and receive pay.

October 15, 1936

10-15

FILED
56

Hon. George E. Mapes
Clerk of the County Court
Grundy County
Trenton, Missouri

Dear Sir:

Your recent communication to Honorable Forrest Smith has been referred to this office. We shall proceed to consider your problems in the order in which they are suggested.

I.

Absentee ballots to be printed thirty days before election.

On June 14, 1934, this office rendered an opinion to Honorable Henry M. Phillips, Prosecuting Attorney, Stoddard County, Bloomfield, Missouri, in which the following conclusion is reached:

> "There is no time designated for the printing of such official absentee ballots therefore we are of the opinion that such official absentee ballots may be printed more than ten days before the primary election and may be printed in ample time so that a person applying for an absentee ballot can have the privilege as stated in Section 10182, of applying within the full time of thirty days before the primary election."

Although that opinion dealt with absentee ballots to be voted in the primary election the opinion applies with equal force to absentee ballots to be voted in a general election and it is therefore the opinion of this office that the absentee ballots should be printed thirty days before the election so that the full benefit of the absentee ballot law may be afforded the voters.

II.

Absentee ballots may be voted at any time within thirty days before election.

Section 10182, page 264, Laws of Missouri 1935, provides as follows:

> "Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

By virtue of this provision application for an absentee ballot may be made by the prospective voter at any time within thirty days of the date of election.

Section 10185, page 222, Laws of Missouri 1933, directs the absentee voter in the manner of balloting, and after providing for the marking of the ballot in the presence of any officer authorized to administer oaths, and the mailing, postage prepaid, of said ballot to the officer issuing the same, the Section provides:

> "* * *or, if more convenient, it may be delivered in person and such official issue his written receipt therefor, but in any event it must be returned into the hands of the issuing official not later than 6 o'clock p.m. of the day next succeeding the day of such election."

It is therefore clear that the ballot may be marked in the presence of an officer authorized to administer oaths and may be returned in person to the proper election official. This of course could not be done on the day of election for otherwise the absentee voter could not truthfully swear to that portion of the affidavit which states "and that in the course of my business or duties I expect to be absent from said County of my residence on the date of said election." This is also evident from the purpose of the act as stated in Section 10188d, page 224, Laws of Missouri 1933, which states:

> "This act shall be deemed to provide a method of voting by voters absent from their county on the day of election."

It is therefore the opinion of this office that a person may vote an absentee ballot at any time within thirty days prior to the date of the election.

III.

Relatives have the right to convey and transport patient to hospital.

Section 8650 Revised Statutes of Missouri 1929, provides as follows:

> "The relatives of the insane person shall have the right, if they choose, to convey him to the hospital. In such case, the warrant shall be directed to one of them; and the person to whom it is directed and his assistant shall, if demanded, receive the same compensation allowed for the like services to the sheriff."

By virtue of the foregoing Section it appears that an option is given to the relatives of the patient to convey such patient to the hospital, in which case they are to receive the compensation rather than the Sheriff.

In view of the express wording of the statute it is our opinion that the relatives of the patient have the option of conveying such patient to the hospital and that the sheriff is not entitled to compensation when the relatives do so.

Respectfully submitted

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:MM

DELINQUENT TAXES: Costs of printing

October 19, 1936 10-20

FILED 56

Mr. Leonard Manze, Clerk
Howell County Court
West Plains, Missouri

Dear Sir:

This Department is in receipt of your letter of September 15, requesting an opinion as to the following:

> "In regard to Section 9952b General Revenue laws of Missouri, please give an opinion in regard to the expense of publishing, whether or not this expense has to be paid out of the County Budget, or paid with money derived from sale of land."

Section 9952b was amended by the Legislature in 1935, and is to be found in Laws of 1935, page 403, and provides:

> "The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition,

> etc., provided, however,that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof,then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

In view of the above section of our laws, there is no question but that the expense of printing should be paid out of the county treasury and taxed as part of the

costs of the sale of the land.

Respectfully submitted,

JOHN W. HOFFMAN, JR.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

COUNTY COURT: Judges of County Court cannot borrow money personally to pay unappropriated debts of county.

January 7, 1936.

FILED
57

Honorable G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This department is in receipt of your letter of December 10 requesting an opinion as to the following situation in your county:

> "The end of the fiscal year is near. The County Court has about used all the revenues of the year, except some delinquent taxes of former years and a few collections not apportioned and unappropriated in the budget. The county court has created certain debts now due. The budget does not cover these expenses. Now the county court makes the proposition that they borrow personally the money, pay the debts by calling the same a loan, take the receipt of the creditor of the county with the understanding that the creditor be issued a warrant and that the same be indorsed back to the order of the individual members of the county court.
>
> "These warrants to take these debts of the county are to be issued by the county court sometime after the start of the fiscal year in 1936, after the 1st day of February, and are purported to be issued out of revenues collected from the revenues of the year 1935, the year the debts were created.
>
> "The individual members of the county court advance the money and expect to be reimbursed later out of the funds collected from 1935. But the reimbursement is by the members of the court to themselves individually. After reading section 4090 and 4092-1929, it seems apparent that the

> court has laid themselves liable in allowing these accounts with the understanding that the payee of the warrant shall be the creditor, who will in turn indorse the same back to the county judge for reimbursement.
>
> "What is your opinion of the legal consequences of the arrangement to meet the current accounts and later reimburse the county judges by the issuing of these warrants?"

From a reading of your letter we cannot determine whether or not the County Court has already carried the plan into execution or contemplate carrying it into execution. However, as we will look at the matter purely from its legal aspects, that feature will be disregarded.

The terms of the County Budget Act, passed by the General Assembly in 1933 (Laws of Mo. 1933, p. 340), make it compulsory on the county court at the regular February Term each year to classify expenditures into six classes, making each class a priority over each succeeding class. Section 8 thereof provides in part as follows:

> " * * * Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

It is to be noted that by the terms of the above provision any warrant drawn contrary to the provisions of the County Budget Act is void and of no binding force or effect and any one participating in the issuance of such warrant is liable on his official bond.

We shall next proceed to discuss the effect of the other features of the proposed plan. We are constrained to say that this plan of financing the county is most unique and has never before come to the writer's attention. Granting that the County Court has nothing but the most conscientious motives in offering to advance their own personal funds for the debts of the county, we cannot do otherwise than condemn the plan in its

entirety regardless of the serious situation which may confront the members of the County Court.

There are a number of statutes which bear indirectly on the question of the liability of the different members criminally. Section 4090 R.S. Mo. 1929 provides:

> "Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member, such claim or demand, or part thereof, being for or on account of any contract or demand or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

Section 4094, R.S. Mo. 1929 bears on the criminal liability which may be incurred by the members of the county court, and is as follows:

> "Every clerk of a court of record, sheriff, marshal, constable, collector of public revenue, or deputy of any such officer, or a judge of a county court, prosecuting attorney or county treasurer, who shall traffic for or purchase at less than the par value or speculate in any county warrant issued by order of the county court of his county, or in any claim or demand held against such county, shall be

adjudged guilty of a misdemeanor, and shall, upon conviction, be punished by fine not less than twenty nor more than fifty dollars."

Section 4092, R.S. Mo. 1929 provides:

"No judge or justice of any county court in this state shall, either directly or indirectly, become a party to any contract to which such county is a party, or act as any road or bridge commissioner, either general or special, or as keeper of any poor person, or as director in any railroad company in which such county or any township, part of township, city or incorporated town therein is a stockholder, or act as agent for the subscription of any stock voted to any railroad by any county or subdivision thereof; any such judge or justice who shall violate any of the provisions of this section shall be adjudged guilty of a misdemeanor."

CONCLUSION

In view of the provisions of Section 4092, supra, it would appear that the County Court of your county is attempting to contract on behalf of the county with the individual members thereof, which is clearly in violation of said section, and we accordingly so hold.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

INDIGENT PERSONS:)
RAILROADS:)
PUBLIC SERVICE COMMISSION:)

Consent of the Public Service Commission obtained, railroads may issue a special rate to indigent and destitute persons who are charges of the Missouri Relief Commission, and same would not be discriminatory or unlawful.

January 20, 1936.

1-22

FILED
57

Hon. Jas. E. Maxwell
Transient Director
Missouri Relief and Reconstruction Commission
412 East High Street
Jefferson City, Missouri

Dear Mr. Maxwell:

This is to acknowledge your letter dated January 17, 1936, as follows:

> "At the suggestion of the General Passenger Agent's Office of the Missouri Pacific Railway, I am asking for a legal opinion as to the right of the Missouri Pacific Railway to issue a charity rate to indigent and destitute persons who are charges of the Missouri Relief Commission administering Federal funds in Missouri, in accordance with the Tariff established between the common carriers and the Federal Emergency Relief Administration, Supplement No. 6 which I am including in this letter.
>
> "Missouri, in common with all the other states in the Union, has been, from time to time, taking advantage of this reduced rate for the returning of indigent persons to their place of legal residence, or the care of friends or relatives. The point at issue seems to be whether this is in conflict with Section 10442 and 10444 of RS-1919 of

> the Missouri statutes. The Railroad is perfectly willing, and indeed anxious to comply with our request for the F.E.R.A. rate, if it is possible to do so.
>
> "I should like to have an opinion on this matter from your office."

Section 10442, R. S. Mo. 1919, was carried forth in the revision of 1929 as Section 5153, R. S. Mo. 1929, and Section 10444, R. S. Mo. 1919, is found in Revised Statutes of Missouri, 1929, as Section 5155, R. S. Mo. 1929. Hereafter when we refer to any statutes we designate them as the section numbers found in the Revised Statutes of 1929.

Article 2, Chapter 33, R. S. Mo. 1929, pertains to "Railroads, Street Railroads and Common Carriers," and section 5146 of said article and chapter provides as follows:

> "The provisions of this article shall apply to the transportation of passengers or property from one point to another within this state, and to any common carrier performing such service."

Section 5149 provides in part as follows:

> "Every common carrier shall file with the commission and shall print and keep open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property within this state between each point upon its route and all other points thereon; * * *"

Section 5151 provides in part as follows:

> "Unless the commission otherwise orders no change shall be made in any rate, fare or charge, or joint rate,

> fare or charge, which shall have been filed and published by a common carrier in compliance with the requirements of this chapter except after thirty days' notice to the commission and publication for thirty days as required by this chapter, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, fare or charge will go into effect; * * * * *."

Sections 5153 and 5155, R. S. Mo. 1929 (referred to in your letter as Sections 10442 and 10444, R. S. Mo. 1919, respectively) prohibit a "common carrier" from unjustly discriminating against persons "for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions."

It is to be kept in mind that the Public Service Commission of Missouri is charged with the duty of supervising "common carriers" for the welfare of the public.

> "The power of the public service commission is an exercise of the police power of the state granted by the lawmaking power to that tribunal and overrides all contracts, privileges, franchises, charters, or city ordinances. The exercise of such police powers are by the statutes granting same made subject to review and control by the courts as to being unreasonable or unlawful. The only question for the circuit court on the writ of review, and by this court on appeal, is whether the orders made by the commission subserve the public welfare in manner and to an extent reasonable and lawful, and this question is to be solved regardless of contract rights or obligations, except as such enter into the reasonableness or lawfulness of the orders made."--
>
> State ex rel. City of Kirwood v. Public Service Commission et al., 50 S. W. (2d) 114, l. c. 118 (Mo. Sup.)

You state that the Missouri Pacific Railway desires to give a charity rate for indigent and destitute persons who are charges of the Missouri Relief Commission administering Federal funds in Missouri, as was done under Supplement No. 6 between common carriers and the Federal Emergency Relief Administration. You desire to know if railway companies issue such a rate, if it would be violative of our statutes.

Supplement No. 6, attached to your letter, shows a reduced rate for F.E.R.A. tickets and certain conditions were attached concerning the use of said tickets, that is, same being good only for passage in coaches from starting point to destination and were not validated or honored on certain limited trains. Other exceptions were also contained as to the use of said tickets. In other words, the use of the F.E.R.A. tickets by certain indigent persons took away from said users certain rights and privileges enjoyed by persons traveling on higher rate tickets. The only question presented, then, is as to whether or not there is any discrimination in the use of these tickets such as to constitute a violation of Sections 5153 or 5155, supra.

In our opinion, if the Missouri Pacific Railway Company obtains the consent of the Public Service Commission of Missouri, it may issue a charity rate to indigent and destitute persons who are charges of the Missouri Relief Commission, in accordance with the Tariff established between the common carriers and the Federal Emergency Relief, i.e., Supplement No. 6. If such a rate is approved by the Public Service Commission, we do not believe that it would be discriminatory or violative of Sections 5153 and 5155, supra, in view of State ex rel. v. Public Service Commission, 10 S. W. (2d) 946, wherein the Supreme Court of Missouri, l. c. 951, held:

> "It is settled by the decisions of both state and federal courts that the mere fact a rate fixed is discriminatory is not conclusive that such discrimination is unjust, and therefore unlawful and

invalid. (Cases cited.) * * * * *
In State v. M., K. & T. Ry. supra, this court said (loc. cit. 525 of 262 Mo. (172 S. W. 40)):

"'Arbitrary discriminations alone are unjust if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination.'

* * * * * *

"But neither at common law nor under the statutes, state or federal, is the carrier prohibited from giving a preference or advantage, or from discriminating between localities, provided such preference, advantage, or discrimination is not unreasonable.'"

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

SPECIAL ROAD DISTRICTS: May spend bond money for purchase of machinery.

January 28, 1936.

FILED 57

Hon. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "We have in this County a special road district organized under the provisions of Sections 8024-8060, 1929 statutes.
>
> "The special road district voted a bond issue under sections 7960-7964 of the 1929 statutes. Can a special road district organized under Sections 8024-8060 of the 1929 statutes?
>
> "The money obtained from this bond issue be used to purchase road building machinery for the special road district?
>
> "Can the road commissioners of this special road district buy from one of the commissioners materials for use in road building, such as concrete culverts made on the farm of the commissioners? The purchase price co es out of the funds of the district, and is allowed by the commissioners.
>
> "One of the special road commissioners is a blacksmith. He does all the blacksmithing for the special road district, such as repairing the tools and sharpening the tools. Can this commissioner collect

for his work and labor out of the moneys of the district, when his account is allowed by the other commissioners?

"One of the special road commissioners of this district draws days wages by his work on the road along with the other road laborers. He helps load rock, keeps time of the laborers, including himself, he acts as a foreman, and directs the work done by himself and others. His days wages comes out of the moneys of the special road district- his labor bill is allowed along with the other laborers by the commissioners of the special road district. I suppose that by 'commissioners' it is meant that he is one of the commissioners that pass on his wages for work and labor performed. Can such a commissioner draw wages for day labor out of the proceeds of the special road district road funds?"

The three first paragraphs of your inquiry we believe to be answered by former opinions of this office, copies of which are enclosed herein, to-wit, one dated January 7, 1936, to Hon. W. Ed Jameson, President, Board of Managers, State Eleemosynary Institutions, Jefferson City, Missouri; one dated September 17, 1934, to Hon. Arch M. Skelton, Prosecuting Attorney of Lafayette County, and one dated January 26, 1935, to Hon. Elliott M. Dampf, Prosecuting Attorney of Cole County.

We construe your other inquiry to be this: Has the board of commissioners of such eight-mile special road district authority to purchase for the special road district machinery suitable to be used in carrying on the work of repairing, maintaining and building roads on behalf of the district, and pay for said machinery with the money coming to said district by reason of the issuance and sale of bonds by the district?

Section 8033, R. S. Mo. 1929, provides as follows:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of

> these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

Section 8047 thereof provides:

> "The fund received from the poll and road tax of said district shall constitute a general district road fund, and shall be disbursed only as hereinbefore provided, and shall be used only for working, repairing and improving the public roads of such district as herein provided, and for no other purpose; and no part thereof shall be used for paying damages and costs for opening new roads, but all such damages and costs for opening new roads paid by the county shall be paid out of the other county revenue, except as this article may otherwise provide."

It will be noted that Section 8047 does not say that the funds received from poll and road tax of the district shall be used only for working, repairing and improving the public roads, but it says that they constitute a general district road fund and shall be disbursed only as in this article (Article 9, Chapter 42) provided, which includes the rights and authority set forth in Section 8033, which latter section authorizes the board to "rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work."

When a bond issue is voted by the district and money is received by the district from the sale of such bonds, we know of no provision of law which prohibits the expenditure of

such funds in the purchase of road building machinery for the special road district. The money arising from the sale of the bonds, which is in effect a mortgage upon the property located within the special road district, is in law treated on the same basis, for the purpose of such purchase, as is the money coming to said special road district by reason of the levy and collection of taxes on the property located within said district under the general property tax law.

CONCLUSION

It is our opinion that the money owned by such special eight-mile road district as the result of a bond issue by said district may be legally expended by the district for the purchase of road building machinery to be used in such special road district.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

COUNTY COURTS:

OLD AGE ASSISTANCE: Old Age Assistance Board is not entitled to compensation. County Court has no authority to make donations to them, but is not liable for making such donations if made in good faith under the belief they have authority so to do.

2-6

January 28, 1936.

FILED
57

Hon. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "The County Court made a donation in cash to the county old age assistance board. Now the board comes back, and wants to hold the County for a salary in the amount of $4.00 per day.
>
> "After reading section 3, page 309 of the 1935 session acts, it appears that the board is not entitled to any compensation. Just what is meant by compensation? Is there any legal way for the county court to even make a donation for the services of the county pension board?
>
> "Is the County Court liable for the donation already made to the county pension board?
>
> "Can the board allege that their expenses are such that they are entitled to $4.00 per day? The State Old Age Commissioner has been allowing this local county board necessary and actual expenses.
>
> "If you have issued other opinions, let me have a copy."

We construe your questions to be: First, are the members of the Old Age Assistance Board entitled to a salary from the county for the performance of their official duties thereon; second, does the law authorize the county court to make a donation from the county revenues for the services of the members of the Old Age Assistance Board, and, third, if it does not so authorize them and they issue warrants in favor of the members of such Old Age Assistance Board in furtherance, as they think, of the administration of the Old Age Assistance Act, are the judges of the county court personally liable for the money so paid out on said warrants?

Your first question appears to be answered by an opinion of this department dated October 10, 1935, to Mr. Arthur C. Mueller, Prosecuting Attorney of Gasconade County, in which it was held "that the members of the County Old Age Assistance Board are only entitled to the necessary expenses incurred for meals while performing their duties, not to exceed the maximum amount fixed by the Old Age Assistance Division", and in which it is stated that the county boards serve without compensation except the necessary expenses incurred while engaged in the performance of their duties. A copy of said opinion is herein enclosed.

Likewise, an opinion rendered by this office of date December 23, 1935, to Hon. John J. Wolfe, Associate Prosecuting Attorney of St. Louis County, holds that the county court can not relieve itself of the duties imposed by statute, relative to the poor, by delegating its duties to a board established by it, a copy of said opinion being enclosed herein.

Your third inquiry appears to be on the border line.

Section 36 of Article VI of the Missouri Constitution provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

In the case of Knox County v. Hunolt, 110 Mo. 67, the court had under consideration the liability of the members of the county court to repay county school funds which had been used by the county for other county purposes, and in that case it was held that such court had no discretion by which they could apply the fund to the payment of ordinary county debts. The court said, l. c. 76:

> "It can make no difference that the act was not corrupt or a wilful violation of the law, and so the trial court ruled. This fund should be replaced by those who diverted it."

At page 75 the court says:

> "But where the public officer is by law vested with discretionary ministerial powers, and he acts within the scope of his authority, he is not liable in damages for an error in judgment, unless guilty of corruption or a wilful violation of the law. He is not liable for an honest mistake."

But the court there held that there was no discretion lodged in the county court as to the use to which such school money should be applied, and that the use of such funds for the payment of ordinary county debts was an act in direct violation of the Constitution and laws creating that fund, and was therefore nothing short of malfeasance.

Likewise in the case of Consolidated School Dist. No. 6 v. Shawhan, 273 S. W. 182, the Supreme Court of this state holds the directors of a school district liable for using that part of the school district funds which made up the teachers' fund for other school purposes.

It appears to us that those cases are not applicable to your third question.

The county court derives its authority from the State Constitution, supra, and from other statutes passed which are consistent with the constitutional provisions.

In the case of State ex rel. Mitchell v. Rose, 281 S. W. 396, the Supreme Court of Missouri en Banc (1926) held that the county court had the constitutional authority to review and audit county bills, and the duty to look after public funds, examine, audit, adjust and settle all accounts, and pay sums found due on such accounts, and that the Legislature could not by passing a law stating that "the amounts of money due and payable to the registrars under the provisions of this section shall be certified to the county courts, which courts shall pay the same by warrant drawn upon the county treasurer and payable out of the contingent fund of the county", require the county court to pay such certified amounts, but that the county court has the constitutional authority to pass on such bills, saying, l. c. 397:

> "The various provisions of the Constitution and statutes (articles 6, Sec. 36, Const. of Mo., and sections 2574 and 9560, R. S. Mo. 1919) demonstrate that it is not only within the power, but is the duty, of the county court to look after public funds, examine, audit, adjust, and settle all accounts to which the county shall be a party, and to pay out of the county treasury any sum of money found to be due by the county on such accounts; in short, responsibility for the safety of public funds, the accuracy and honesty of accounts, and statements of officials, is imposed on the county courts. It is for the county court to audit the claim of the relator to determine the correctness of same and to say whether it will demand that the correctness of the reports made to it by the state registrar shall be decided by the judicial department of the government before payment is made. State ex rel. Forgrave v. Hill et al., 198 S. W. 844, 272 Mo. 206, loc. cit. 213."

Section 12950, R. S. Mo. 1929, provides:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 12953 provides:

> "The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

By Section 12954 the county court has discretion as to the granting of relief to all persons, the statute providing:

> "The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

In the case of Scotland County v. McKee, 168 Mo. 282, a party was a resident of Quincy, Illinois, and not entitled as a matter of right to be sent to the asylum at the expense of the county, and the court entered an order of record to that effect. The next day the county court decided to send the patient to the asylum, other parties on her behalf furnishing a bond to the county that they would pay $50.00 per year toward such expenses. The court, l. c. 287, said:

> "But in this instance the county court, doubtless under the importunity of the legal guardian and of the father of the person, concluded that it had some discretion and could afford partial relief, not under the statutes relating to the asylum, but under the authority of section 6583, Revised Statutes 1879, relating to poor persons: 'The county court shall, at all times, use its discretion, and grant relief to all persons, without regard to residence, who may require its assistance.' So the court, after having first refused the application, on reconsideration concluded that it was justified in granting some relief, though not all that was first asked, and made the order under which the unfortunate person was sent to the asylum under express contract with her father, the defendant herein, evidenced by his bond in this suit that he would pay $50.00 yearly of the expense. The court was not bound to have done anything for the relief of the insane person, but had authority under that statute to exercise its discretion and grant some relief on such terms and conditions as it saw fit."

In the case of State ex rel. v. Diemer, 255 Mo. 336, the county court had employed a highway engineer on an agreement to pay him $1200.00 for the year's salary, and entered into a contract to that effect, but stated to him that if at the end of a year he had well performed his duties and demonstrated his competency by actual services, they would pay

him an additional $300.00. He accepted the proposition and the court entered of record an order appointing him for a term of three years and fixing his salary at $1200.00. At the end of the year he presented his account for $300.00 additional pay for services and the court investigated his work and found that he had well and intelligently performed his duties, and allowed his claim. It is admitted that they acted in good faith. Thereafter suit was brought against the judges of the county court to recover this $300.00 as illegally paid by them. The Supreme Court, speaking through Lamm, J., declined to authorize recovery, saying, l. c. 353:

> "In the next place, county courts in Missouri are by name vested with judicial power. (Constitution, sec. 1, art. 6.) They are made by the same instrument courts of record (Sec. 36, art. 6) and are given 'jurisdiction to transact all county and such other business as may be prescribed by law.' Agreeably to those constitutional provisions the statutes make them courts of record. (R. S. 1909, sec. 3845.) Their sittings must be public and every person may freely attend. (R. S. 1909, sec. 3862; Constitution, sec. 10, art. 2.) They are given power to audit, adjust and settle all accounts to which the county shall be a party; to pay out of the county treasury any sum of money found to be due by the county on such accounts; to issue process to secure the attendance of person, whether a party or a witness, when deemed necessary in the examination of accounts; to compel attendance by attachment; to examine parties and witnesses under oath in the investigation of accounts; and to commit to jail for contempt for refusal to answer any lawful question. (R. S. 1909, sec. 3781.) In addition to the section just quoted, as a court of record they may punish for contempt under other provisions of the statute. (R. S. 1909, sec. 3881.) When an appeal is proper from their 'judgments and orders' the circuit court is given appellate jurisdiction. (R. S. 1909, secs. 3956, 4091.) An appeal lies from the rejection of a claim in the county court. (R. S. 1909, sec. 4096.)

"In addition to enumerated provisions showing the intimate relation between their judicial and ministerial authority, an intermingling of the two with a line of demarkation so vaguely drawn that the edges of the two authorities often overlap, there are many statutes giving them strictly judicial powers in particular instances.

"The premises considered it becomes apparent that, although we have held that in the matter of allowing claims against the county they act in a public ministerial, administrative, or auditing capacity, yet in their performance of ministerial duties in allowing claims their acts partake of the nature of judicial acts and are so related thereto in color and substance that they may be deemed not inaptly quasi judicial. On that account they are protected from personal liability except in the inflamed case of fraud, corruption or malice. It must be obvious that were the law otherwise it would be impossible to get suitable persons to perform the many and important public duties assigned, under our system, to county courts. He would be a bold man who would put his personal fortune to the hazard of mistakes in deciding the nice and complicated questions put up to that body.

"The question, one of public concern, in some of its phases, is by no means new. Pike v. Megoun, 44 Mo. l. c. 496 et seq., followed Reed v. Conway, 20 Mo. 22, in holding to the general doctrine announced above. In the Pike case it was ruled:

"'When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. (Wilson v. The Mayor, 1 Den. 599; Rochester White Lead Co. v. City of Rochester, 3 Comst. 463.) And the same rule obtains where

judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of wilifulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect to his duty.'

"The Reed-Conway case, supra, quoted with approval from Jenkins v. Waldron, 11 Johns. Rep. l. c. 121. In that case inspectors of election were sued for denying a voter the right to vote. In denying recovery the eminent bench, presided over by no less an authority in the law than Kent, closed its judgment with these words:

"'It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.'

"To the same effect is Schoettgen v. Wilson, 48 Mo. 253.

"These defendants were acting within the scope of their express statutory authority in allowing or disallowing claims. They were not guilty of arbitrarily, wantonly, oppressively or fraudulently conducting themselves and, under such circumstances, they are not personally liable for acting in accordance with their honest convictions of duty. (McCutcheon v. Windsor, 55 Mo. l. c. 153.) The reasoning of Washington County v. Boyd, 64 Mo. 179, sustains the judgment below; and so does that of Edwards v. Ferguson, 73 Mo. 686, and Knox County v. Hunolt, 110 Mo. l. c. 75, and Albers v.

> Merchants' Exchange, 138 Mo. l. c. 164, and Williams v. Elliott, 76 Mo. App. l. c. 12 (a case on its facts nearly in point), and so Schooler v. Arrington, 106 Mo. App. 607."

In the case of Williams v. Elliott, 76 Mo. App. 8, it is held that a public officer clothed with discretionary ministerial powers is not liable for an error of judgment unless guilty of malice, corruption or wilful violation of law, and that the judges of the County Court of Jasper County are not personally liable for the rescission of an order accepting a bid and awarding a contract and the refusal to approve a collateral indemnifying bond.

Likewise in the case of City of St. Joseph v. McCabe, 58 Mo. App. 542, a suit was instituted against the city engineer of St. Joseph and his bondsmen to recover the amount lost on certain tax bills purchased by the plaintiff and which were illegally issued and certified by said McCabe as such city engineer. The court declined to permit recovery and said, l. c. 549:

> "It was the duty of the city engineer to pass judgment on the work of paving the street, and determine whether or not the contract had been substantially complied with. While, then, he is a ministerial officer he is vested with quasi judicial functions. In such a case the rule is, 'that a ministerial officer, acting in a matter before him with discretionary power, or acting in a matter before him judicially, or as a quasi judge, is not responsible to any one receiving an injury from such act, unless the officer act maliciously and willfully wrong.' Reed v. Conway, 20 Mo. 22 at p. 434, and numerous cases there reviewed. Edwards v. Ferguson, 73 Mo. 686. 'To render a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect of his duty.' Pike v. McGown, 44 Mo. 496, 497."

In view of the above decisions of the courts of this state, it appears that where the officer in question is invested with some discretion and is not circumscribed and limited by a positive statute, he may exercise that discretion, and if so exercised in good faith, he is not liable personally, although he may erroneously or illegally perform the given act.

Your inquiry does not state whether there is any fraudulent effort or act on the part of the court. If their act is the result of their fraudulent design, then, of course, they would be personally liable, but if in good faith and in the performance of their official duties as they reasonably see such duties, they authorize the payment of public funds of the county, and there is no law justifying such payment, they are not under the above holdings personally liable.

The next question is to classify the given acts under consideration. It is a matter of common knowledge that in these distressing times, more particularly and in abundance the Biblical statement is true that "the poor we have with us always". The President of the United States has issued from the highest executive authority in the Nation a proclamation that a national emergency exists. A great deal of public effort has been exerted by not only the executive but by the legislative department of our Nation in the Herculean attempt to save poor people from suffering privation in their old age. Likewise has such effort been made by the State in its executive and legislative bodies. Relief measures have been passed and the public funds are being administered in assistance to the poor. The Old Age Assistance Act passed by the Federal Government is a part of this general plan and effort. Likewise the State of Missouri has passed an Act in conformity and in conjunction with the same Act and efforts as the National Act. The depressing and unfortunate condition which prompted this national and state legislation and executive effort exists nationally and state-wide because it exists in the county in question and in every other county. These facts are piteously brought home to the members of the county court. They hear the voice of hunger every time they convene.

It does not require a stretch of the imagination to get the viewpoint of the members of the county court that by helping the County Old Age Assistance Board in getting the machinery of that branch of relief working smoothly and efficiently, they were doing a just and proper thing for the welfare of the people of their county, and if the members of the county court who honestly believed they had a right, though absent the legal right, to rescind a contract are under

no personal liability therefor, and if the county court who honestly believed they had a right to pay out $300.00 to the county highway engineer, when they did not have that legal right, were under no personal liability therefor, it would appear that the members of your county court, honestly believing that they had the right to pay out the funds you inquire about to the County Old Age Assistance Board, should not be under the personal liability to reimburse the county for the same.

The above is said bearing in mind the provisions of the County Budget Law and conditioned on compliance by the court with the provisions thereof, i. e., the money that has been so paid out as set forth in your third inquiry shall not result in or contribute to violation of the Budget Law requirement (Laws of Missouri, 1933, pp. 340, et seq.) that the priorities therein set forth "shall be sacredly preserved", which means (1) that the insane pauper patients in state hospitals shall have a sufficient sum set aside so they may be cared for; (2) similar provisions shall have been made for Classes two, three and four. In this connection it will be noted that the Budget Act does not in terms, nor, as we see it, by implication repeal Section 12954, R. S. Mo. 1929, authorizing the county court to exercise its "discretion and grant relief to all persons, without regard to residence, who may require its assistance." The provision, page 346, of the Budget Law is as follows:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

If such acts do violate the provisions of the County Budget Law, then not only the members of the county court, but also the county clerk, county treasurer, or any officer participating in the issuance or payment of such warrant is personally liable and also liable therefor on his bond for so participating in such illegal payment.

CONCLUSION

It is our opinion that the members of the county court are under no personal liability on account of having paid out without justification in law county money to members of the County Old Age Assistance Board if the members of such court so paying such money out acted in good faith and under the belief, though mistaken, that they had the legal right to so pay out such money.

If in a suit filed testing the authority of the county court to so pay out such money and seeking to recover personally from the members thereof, the evidence showed that the county court had not acted in good faith, but had fraudulently connived to violate the law, knowing at the time that they were so doing, then the members of the county court would be personally liable to reimburse the county for the funds so illegally paid out.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

CIRCUIT CLERKS-CIRCUIT COURTS: Rule of Circuit Court receiving $10.00 filing fee in advance must not be arbitrarily enforced.

March 9, 1936.

359

FILED
57

Mr. George E. Masters
Clerk of the Circuit Court
Jasper County
Carthage, Missouri

Dear Sir:

We acknowledge your request for an opinion dated February 29, 1936, which reads as follows:

> "Section 1241 of the Revised Statutes of Mo., 1929, quotes as follows, to-wit:
>
> " 'If any person file, before any clerk in vacation, an affidavit that he has a just and subsisting cause of action on which he proposes to bring a suit, and that he is unable to pay the costs, the clerk shall issue an original writ, without fees for the same. But the Court may, in its discretion, refuse or permit the further prosecution of the suit.'
>
> "On January 1st, 1932, the Court (both Judges) made a ruling requiring a deposit of $10.00 with each civil case filed in our Courts, as a guarantee of Court Costs, if they wish to prosecute as a poor person, the attorney would take up the matter with one of the Judges and if he permitted them to file said case without the filing fee, said permission was indicated to the Clerk by a written permission to do so.
>
> "All lawyers comply with this ruling with the exception of one young fellow, who recently located in Joplin from Kansas City. He says that such a ruling is in conflict with Section #1241. I shall be pleased to have your opinion in the matter at your earliest convenience, for which I thank you."

Article II, Section 10, of the Missouri Constitution provides:

> "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

In the case of State ex rel. v. Johnson, 182 S. W. 969; 266 Mo. 662, l. c. 670, our Supreme Court said in construing a trial court rule against the above constitutional provision.

> "It has been uniformly held that this provision does not deprive the courts of general jurisdiction of their power to make reasonable rules governing the order of trial of cases and regulating their proceedings in their administration of the law. That the exercise of such inherent and necessary power on the part of the courts does not violate the above quoted clause of the organic law."

Pursuant to the above constitutional provision the Legislature enacted section 1241 R. S. Mo. 1929, which provides:

> "If any person file, before any clerk in vacation, an affidavit that he has a just and subsisting cause of action on which he proposes to bring a suit, and that he is unable to pay the costs, the clerk shall issue an original writ, without fees for the same. But the court may, in its discretion, refuse or permit the further prosecution of the suit."

CONCLUSION.

Any rule, act, or conduct of the Circuit Court of Jasper County, which presupposes an arbitrary closing of the doors of courts of this State to any person who

files an affidavit before a Circuit Clerk, stating that he has a just and subsisting cause of action on which he proposes to bring suit, and that he is unable to pay the costs, is not only in violation of Section 1241, supra, but the same is against the fundamental law of this State. Such a rule cannot meet the test of reasonableness.

When such an affidavit is filed in vacation with the Circuit Clerk, it is the clerk's duty to issue an original writ without first collecting the $10.00 filing fee in advance, as provided in the general rule of the Circuit Court of Jasper County.

The fact that process be issued by the Circuit Clerk, pursuant to Section 1241, supra, does not mean that the Circuit Court must proceed to try the cause without requiring such an affiant to give security for costs, for the Circuit Court, on motion and hearing, may, in its sound discretion, dismiss the suit. See sections 1237 and 1238, R. S. Mo. 1929.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN
(Acting) Attorney General.

OFFICERS: County must furnish and pay for reasonable office expenses of county officials.

COUNTIES:

August 8, 1936. 8-10

FILED 57

Hon. Thomas A. Matthews,
Prosecuting Attorney,
St. Francois County,
Farmington, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

> "Mr. Joe Grandhomme, Collector of Revenue of St. Francois County, Missouri, asked that I write and obtain from you an opinion on the following:
>
> "Whether or not the County Court must or may allow expenses for office of ex-officio Treasurer, or whether such construction must be placed upon Section 12132a, page 339, Session Acts of the year 1933."

We construe your question to be, what are the legal rights of the Collector of the Revenue and Ex-officio Treasurer of St. Francois County with respect to being reimbursed by the county for expenses reasonably incurred by him in the performance of his official duties?

The law passed by the 1933 Legislature relating to the consolidation of the offices of Treasurer and Collector in certain counties (Laws of 1933, page 338) does not deal with the question of expenses of the office. It merely provides for the consolidation in certain instances of the two offices, and in counties having a population of less than forty thousand inhabitants provides that the County Collector shall take over all the duties of the Treasurer, and shall be not only County Collector but Ex-officio Treasurer, and shall perform the duties attached to both offices with no additional remuneration beyond that allowed as County Collector.

Section 12138 of said Laws evidently is dealing with the compensation of Treasurers of counties other than those falling within the class we are now discussing, and for the purposes here we assume that St. Francois County does not operate under township organization and is a county the population of which, according to the last decennial United States census, is shown to be less than forty thousand inhabitants.

The question you asked has been passed on by the courts in Missouri. In the case of Ewing v. Vernon County, 216 Mo. 681, the court had under consideration the right of the Recorder of Vernon County to recover money that he had paid out for janitor services in caring for the Recorder's office. At page 693 the court says:

> "Finally, we shall assume that among civilized people approved advances and results in scientific research make janitor services in public offices (i. e., the prevention of the propagation and spread of disease from filth), a necessity, and that the Legislature knew and gave effect to that fact."

The court further says that buildings for Clerks' and Recorders' offices

> "being for the preservation of the records of the county, how could this main idea have effect if those records are not to be kept free from deterioration from filth? Is the general public not interested in and benefitted by clean windows, clean floors, clean furniture, clean spittoons, heat in winter and wholesome, healthy air at all times in public offices? It is useless to argue that question. It answers itself."

And in that case the county was required to reimburse the Recorder for such money reasonably expended by him in procuring the services of the janitor in properly caring for the office.

In the more recent case of Buchanan v. Ralls County, (1920) 283 Mo. 10, the Supreme Court of Missouri held that the county was under the liability to pay back to the County Treasurer the money theretofore expended by her in paying rent for the Treasurer's office during her incumbency, saying l. c. 15:

> "It was the duty of the appellant to furnish respondent with suitable office space, heat, lights and janitor service."

And further, l. c. 17:

> "* * * we think the jury should be instructed that if the appellant failed to provide for the use of respondent reasonably suitable space in the courthouse or elsewhere in the county seat in which to maintain her office and transact her official business, then respondent had the right to provide such office, and to provide heat, light and janitor service therefor, and that the county is bound to pay the reasonable cost of the same."

From the principles applied and the holdings in the above two cases, it would seem that the county is under the legal liability and obligation to provide for the holder of a public county office all of the reasonably required equipment to properly discharge the duties of such office, and that the County Collector and Ex-officio Treasurer is so entitled to have furnished for him by the county reasonable janitor services, books and records, stationery, postage stamps, ink, and office equipment, and that if the county fails to so provide the same, such officer may provide therefor and recover from the county the reasonable cost of so providing therefor.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN,
(Acting) Attorney General.

DW:HR

ELECTIONS:--Conviction for felony disqualifies voter until full pardon is granted:

EXCEPTIONS:- As to convicts under twenty or 18 years of age. 9120A

August 27, 1936.

8-28

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We have your request for an opinion as to whether or not a person who has been convicted of a felony, either under the prohibition law before repeal, or under the statute making it grand larceny to steal chickens in the night time, has a right to vote. Also, you inquire as to whether or not boys convicted of stealing chickens in the night time and sent to Algoa for two years may later become eligible to vote.

We call your attention to that portion ot Section 10178 R. S. Missouri 1929, relating to the qualifications of voters, which is as follows:

> "*****nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon;********"

There is only one way to obtain a full pardon subsequent to the conviction of a felony and that is provided for under Section 8518, Laws of Missouri 1933, page 329, requiring a petition to the governor requesting a pardon and setting out the reasons therefor.

Under Section 4172 R. S. Missouri 1929, any person who is convicted of a certain offense and sentenced to the penitentiary for any crime punishable under the provisions of Article V of Chapter 30, R. S. Missouri 1929, is forever disqualified from voting at any election. This section does not apply to any person under the age of twenty years at the time of his conviction. As a part of Article V, Section 4066 R. S. Missouri 1929, makes it a felony to steal chickens in the night time, and such a conviction under Sections 10178 and 4172 would prevent the person from voting unless a full pardon had been received.

In the event that a person was convicted and sentenced to the Algoa Reformatory, his citizenship would automatically be restored at the expiration of his sentence under the provisions of Section 12971, only if he were under eighteen years of age at the time of his conviction.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

FER:MM

TAXATION: COUNTY COURTS--May correct erroneous description of land.

TAXATION; COUNTY COURTS--May compromise taxes only as provided for in Section 9950 as amended.

August 31, 1936.

8-31

FILED
57

Mr. Thomas A. Mathews
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

We have your request of August 28, 1936, for an opinion of this office as follows:

> "The assessment of property in the name of B. H. Marbury for the years 1933, 1934 and 1935 is described on the assessment book and tax book as follows:
>
> One acre in survey 349 in the City of Farmington, St. Francois County, Missouri.
>
> And because of the inadequate, vague and indefinite description of this property the party owning same refuses to pay the taxes on the property as a result of the assessment made above.
>
> The County Court of this County realizing their position, on the 12th day of their May term of Court, this year, corrected the description, as the certified copy of order hereto attached will show. Mr. Marbury refuses to pay his taxes for the reason above stated and the County Court and Collector of this County are desirous of knowing whether or not they should accept the offer of 50¢ on the dollar in order to compromise and settle the taxes or proceed to advertise and sell the property under the Jones Act, and describing the property as the certified copy of Court will show."

It may be said that the original assessment description of the property to be assessed is inadequate and therefore the assessment is invalid. State ex rel. vs. Lamb, 25 S.W. (2d) 83.

However, Section 9946, Amended Laws 1933, page 424, among other things provides as follows:

> "In all cases where any assessor or assessors,****shall have assessed and levied taxes,****on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon,****the county court of any county shall have full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description******* or otherwise****. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation."

We find that the county court of St. Francois County at the May Term 1936, corrected the description of the tract of land in question, and for the purpose of this opinion we assume that the corrected description is accurate.

As to the right of the county court to compromise these taxes for fifty cents on the dollar, we call your attention to certain provisions of Section 9950, Laws of Missouri 1933, page 427, covering the right of the county court to compromise taxes on real estate:

> "Whenever it shall appear to the county court,*****that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon,******or that the same would not sell for the amount of such taxes, interest cost, it shall be lawful for the said court *****to compromise said taxes with the owner of said tract or lot,*******."

The assessor is required to assess all property at its true value. There is a presumption that officers have properly performed their duty. The County Court is without authority to reduce the value on this real estate, or to accept less than the full amount of taxes penalties and interest thereon except in the two instances provided for in Section 9950.

This office is therefore of the opinion that the county properly corrected the description of this land and that the county court is without authority to compromise the taxes thereon except in accordance with Section 9950, Laws of Missouri 1933, page 427.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

FER:MM

SPECIAL ROAD DISTRICTS:)
ROADS AND BRIDGES:)

Special road district not liable for tort actions or if employee injured or killed while in line of duty.

October 10, 1936.

10-10

FILED
57

Honorable Rice Maupin
Commissioner
Glasgow Eight Mile Road District
Glasgow, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "The road work and maintenance of the rural roads of Howard County is divided into 5 Districts. Roads adjoining Glasgow are in what is known as "Glasgow Eight Mile Road District" is managed by three non-salaried Commissioners, Rice Maupin, Laurence Jackson, and Fred Ferguson.
>
> "For several years past we have been carrying Compensation Insurance and also Public Liability. We would like very much your opinion as to whether the District or County would be legally liable under the Compensation Laws of Missouri, should one of our Employees be injured or killed while in line of duty?"

We have not been able to find any case directly in point in order to answer your question but believe we can reach a correct conclusion by the principles of analogy. There are a great many cases decided by our

appellate courts to the effect that a special road district is not liable for tort actions. Lamar v. Bolivar Special Road District, 201 S. W. 890, l. c. 892, and cases cited.

In Sharp v. Kurth et al., 245 S. W. 636, the St. Louis Court of Appeals said (l. c. 638):

> "Absent legislation making special road districts liable for its negligent acts, it is established by a wealth of authority in Missouri that such districts are public corporations and are quasi political subdivisions of the county and the State and are not liable for negligence in the building and construction of public works, such as roads and bridges.
>
> * * * * *
>
> "It is likewise clear that the individual defendants, being special commissioners of the road district, are not liable for their mistakes of judgment or their acts of negligence in doing work."

From the above we conclude and it is our opinion that the Eight Mile Road District, the county, or the commissioners, would not be legally liable if an employee was injured or killed while in the line of duty. Bush v. State Highway Commission of Missouri, 46 S. W. (2d) 854.

You request as to whether or not it is necessary for you to comply with the Workmens' Compensation laws of Missouri.

Chapter 28, R. S. Missouri, 1929, and amendments, relate to "Workmen's Compensation." Section 3303 provides in part as follows:

> "Sections 3300, 3301 and 3302 of this chapter shall not apply to any of the following employments:
>
> "First: Employments by the state, county, municipal corporation, township, school or road, drainage, swamp and levy districts, or school board, board of education, regents, curators, managers, or control commission, board or any other political subdivisions, corporation, or quasi-corporation thereof."

From the above section it is our opinion that the Eight Mile Special Road District is not liable under the Workmen's Compensation laws of Missouri.

In this opinion we have only undertaken to answer the question of the liability or non-liability of the Eight Mile Special Road District, without regard to whether or not it was proper for such district to have Workmen's Compensation. Suffice it to say that Section 3304, R. S. Mo. 1929, provides that the word "employer", as used in said chapter 28, would include the Glasgow Eight Mile Road District if it elected to accept the provisions of said chapter by law or ordinance. We do not know whether the Glasgow Eight Mile Road District had authority, or has authority, to accept the provisions of the Workmen's Compensation Act. If it accepted the provisions of the chapter relating to Workmen's Compensation, then, of course, compliance thereto is necessary.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

SCHOOL FUNDS:) Counties not permitted to borrow moneys from school
) funds.
COUNTY COURTS:) County Courts must loan school funds as provided by
statute.

October 15, 1936.

10-15

FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This is to acknowledge receipt of your letter of October 9, 1936, in which you request the opinion of this Department on the questions submitted in your letter which is as follows:

> "The County Court has the plan of using common school fund, the town school fund, the township school fund, and the state school fund, and the surplus in the road and canal fund to purchase 1936 warrants with. In other words these surplus funds are to be used to purchase county warrants for 1936, and thus draw 6% interest for the benefit of the funds.
>
> "The Court reasoned this way; that they have custody of the money and must see that it earn a fair rate of interest. They were paying out 6% on their county warrants. They want to pay out the money, and substitute county warrants.
>
> "It seems that school funds should be loaned with prime real estate security, worth twice the amount of the loan, and with a personal bond. How else can the county borrow the money?
>
> "Can the County Court borrow the school funds and put in their place the county warrants in all class for the year 1936?"

We have duly considered the plan suggested in your letter for the handling of the various school funds by the county court. In Sections 9243-9256, R. S. Mo. 1929, the provisions for the handling of the school funds by the county court are set forth. In said statutes we find no provision which would permit the county court to handle or loan the funds in the manner as suggested by your letter. Where a statutory plan for the handling or loaning of public funds is provided by the statute, public officials are not permitted or allowed under the law to adopt any other course than outlined by the statute, and they must strictly follow the statutory plan.

It will be observed that by the statutes mentioned above the county court is given jurisdiction to handle and loan the various school funds and the statutes outline with particularity the method by which these funds may be loaned, the rate of interest, the kind of security, the value of the security, the terms, the bond to be given - all are provided; and they further provide the method by which same may be collected, and the school fund mortgage may be foreclosed in the event of default, all of which must be strictly followed by the county court. It must be remembered that the county court in handling these funds, as other public officials, are trustees and must follow the statute with relation to same.

The Supreme Court of Missouri in the case of Montgomery County v. Auchley, 103 Mo. 492, announced the rule that county courts, being trustees of these funds, that the terms of the trust prescribing the methods of handling same must be strictly followed and the court cannot deviate from the methods outlined in the statutes.

The Supreme Court said in the case of Saline County v. Thorp et al., 337 Mo. 1140, 88 S. W. (2d) 183, l. c. 186:

> "Nothing is better settled than that, under such circumstances, such officers are not acting as they would as individuals with their own property, but as special trustees with every limited authority, and that everyone dealing with them must take notice of those limitations."

The intention of the county court might be commendable, but we find no authority for it to handle said funds other than as provided by the statutes. It is therefore our opinion that your county court is not permitted under the law to adopt the plan set forth in your letter.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

INSANE PERSONS: Notice and summons required of insane person before judgment of insanity in County Court. Temporary incarceration of officer in insane asylum without notice or summons for hearing in County Court does not create vacancy in office of Sheriff.

December 12, 1936.

12-21

FILED
57

Hon. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This department is in receipt or your letter of December 8, 1936, wherein you present the following facts and questions to us for an official opinion. Your letter is as follows:

> "We had an unpleasant task this morning in the County Court. Dave Ball, son of our present sheriff Austin S. Ball, filed a petition for his father to be adjudged of unsound mind. Sheriff Ball has been drinking to excess since he has been sheriff, but has not been dangerous. As you know he shot his son accidentally; and since the 15th day of November, 1936, he has been a menace to his family, himself and the community. Finally his son took the action just named.
>
> "The son, with the friends of Ball, and the physicians put on the evidence before the court that Ball was mentally deranged when he was full of liquor and wanted to kill his best friends. The Court was of the opinion that Sheriff must be confined for treatment because of his insanity from drink, and that he must be confined and he was ordered sent to Fulton. The State Highway Patrol Troopers took him over.
>
> "It was raised before the County Court as to whether the person informed against had to be present; as to whether he should

have counsel, as to whether he should have notice, and whether the person examined should have a jury? The procedure was had under sections 8643-8651 incl. of the 1929 statutes. It was opinion to the court that the Court has jurisdiction because was poor, and unable to pay his keep, was a pauper within the meaning of the law; and these sections applied; and none of the usual requirements as set out above was necessary in order to make the committment final. The procedure in the probate court does provide for the above requirements by statute in order to constitute due process. Under these sections stated, was I right in my opinion?

"Because of the order of the court under sections 8643-8651-1929, is there a vacancy in the office of the sheriff? If there is should the coroner of the county act or should the County Court declare a vacancy and appoint the sheriff-elect? That of course being their choice. The coroner does not want to act; as he is a physician with a large practice."

I.

The first question presented in your letter, in substance, is whether it is essential for the person informed against to be present, should he have counsel, should he have notice, and should he be tried before a jury?

Your letter states that you proceeded with the hearing as to the sanity of the sheriff under Sections 8643 to 8651, R. S. Mo. 1929, inclusive.

Section 8643 contains the procedure to be followed in instituting the proceeding, it being necessary for some citizen to file with the clerk of the county court a statement, in writing, to the effect that the person is insane, and that he has not sufficient estate to support him in a state hospital, and that the facts can be proven by two persons, one of whom is a reputable physician.

Section 8644 provides for the subpoenaing of witnesses, the last sentence of which is:

> "Subpoenas may also be issued for witnesses in behalf of the person alleged to be insane."

Section 8646 is as follows:

> "At the time appointed, unless the investigation shall be adjourned over to some other time, the said court shall cause the witnesses in attendance to be examined before themselves, or a jury, if one be ordered for the purpose, duly chosen and impaneled, according to the practice of the court. At least one of the witnesses examined shall be a reputable physician."

In the decision of Ex Parte Higgins v. Hoctor, 332 Mo. l. c. 1028, the Supreme Co rt in discussing the question of whether a person's rights are violated under the Fifth and Fourteenth Amendments to the Constitution of the United States, states:

> "Petitioner says these sections violate the Fifth and Fourteenth Amendments to the Constitution of the United States, contending that authorizing the probate court to find a person insane and to appoint a guardian of his person and property, without having him present and without the verdict of a jury, deprives him of his liberty and property without due process of law. Petitioner also contends they violate, for the same reason, Section 30 of Article II of the Missouri Constitution. Notice is essential to due process of law. (Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206; Shanklin v. Boyce, 275 Mo. 5, 204 S.W. 187; State ex rel. Terry v. Holtcamp, 330 Mo. 608, 51 S.W. (2d) 13.) However, 'where due notice and an opportunity for a hearing have been given, the presence of the alleged insane person at the hearing is not essential to due process.' (12 C.J. 1211, sec. 987.) Nor does due process of law require a trial by jury, even in all criminal

cases. (2) Therefore, 'in the absence of any provision to the contrary in the State Constitutions, the several State Legislatures may provide for the trial of accused persons without a jury, or before a jury of less than twelve; and may provide that failure to demand a jury in certain cases shall be a waiver of the right to a jury trial otherwise existing.' (12 C.J. 1207, sec. 981, see, also, p. 1190, sec. 956; 6 R.C.L. 458, sec. 453, see, also, pp. 433-436, secs. 430-433.) Courts of equity have always determined issues of fact and constitutional provisions relating to jury trial do not apply to equitable actions. (35 C.J. 159-162, secs. 30, 31, 16 R.C.L. 209, sec. 27.) Offenses against municipal ordinances were triable, at common law and before the adoption of our present Constitution, without a jury and are not required to be tried before a jury now. (Delaney v. Police Court of Kansas City, 167 Mo. 667, 67 S.W. 589; City of St. Louis v. Von Hoffmann, 312 Mo. 600, 280 S.W. 421; as to due process of law see, also, City of St. Louis v. Schefe, 167 Mo. 666, 67 S.W. 1100, affirmed Schefe v. City of St. Louis, 194 U.S. 373, 24 Sup. Ct. 676, 88 L. Ed. 1024; City of St. Louis v. Fischer, 167 Mo. 654, 67 S.W. 872, 64 L.R.A. 679, 99 Am. St. Rep. 614, affirmed Fischer v. City of St. Louis, 194 U.S. 361, 24 Sup. Ct. 673, 40 L. Ed. 1018.) This court said in the Delaney case: '"Due process of law" does not necessarily mean a trial by jury. It simply means a day in court, according to the practice provided for such cases, involving, of course, notice and an opportunity to be heard before judgment is pronounced.'

"Concerning due process of law in insanity hearings, the Supreme Court of the United States said in Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165:

"'The due process clause of the 14th Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course

> of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.' (See, also, Chaloner v. Sherman, 242 U.S. 455, 37 Sup. Ct. 136, 61 L. Ed. 427; White v. White (Tex.), 196 S.W. 508, L.R.A. 1918A, 339.)
>
> "It seems to be rather generally held that at least to fulfill the requirement of due process of law 'there is no right to a jury trial in proceedings to determine the question of a person's insanity, except where, as in some jurisdictions, the right is conferred by statute.' (35 C.J. 182, sec. 71, and cases cited; 16 R.C.L. 205, sec. 23; see, also, 14 R.C.L. 560, sec. 11, 564, sec. 16.) Since an insanity hearing is a civil case, State ex rel. Peper v. Holtcamp, 235 Mo. 232, 138 S.W. 521, it would seem at least that due process of law does not require that there be a jury trial, whether demanded or not, and we so hold."

The above decision was rendered in reference to a hearing in the Probate Court, and while we are mindful of the fact that the question which you present relates to a sanity hearing in the County Court, yet we think that the principles of law stated in the above decision are applicable to the question which you present. We are, therefore, of the following opinion:

That in view of the provisions of Section 8644 that subpoenas may be issued for witnesses in behalf of the alleged insane person, and the fact that there is a trial necessary to determine the issues, would necessarily make notice to the alleged insane person essential to the validity of the hearing. The decision quoted, supra, does not make it mandatory for the alleged insane person to be present at the hearing. He could be represented by counsel, but in either event notice should be served upon him. The above decision and the authorities cited therein do not make it mandatory that the alleged insane person have a right of trial by a jury. Section 8647 states that "if, after such examination, the court or the jury, if one shall have been employed", would naturally make the matter discretionary.

II.

You do not state in your letter as to whether or not the evidence or the finding of the court in the hearing was to the effect that the alleged insane person was temporarily deranged or insane, or whether his insanity was of such a nature as to make him permanently incurable. Such a condition would affect the question of whether or not a vacancy exists in the office of sheriff of your county.

Section 11523, R. S. Mo. 1929, provides in part as follows:

> "Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court."

Section 11525, R. S. Mo. 1929, places the duties of the sheriff on the coroner when the office of sheriff shall be vacant by death or otherwise.

We assume that your county elected a sheriff at the last November election, who will assume his duties on January 1, 1937. Therefore, the vacancy, if any, is of short duration.

In discussing the question of whether there is a vacancy, it would appear from the facts that the present sheriff is unfortunate in that he has become incapacitated and demented from excessive use of intoxicating liquors and has been sent to a state hospital. This, in our opinion, would not constitute a vacancy for the reason that his mental incapacity may be of short duration. As an example, many county officers become ill during their tenure of office. They may be sent to hospitals out of the state, to remain away from their office for months, yet this would not constitute a vacancy within the meaning of the law, unless such officers resigned or declared an intention to abandon the office, or were removed.

There are no decisions directly bearing on the question in this state, but it was held in the case of State v. Pidgeon, 8 Ind. 132, as follows:

> "The insanity of an officer not shown to be incurable will not create a vacancy authorizing permanent appointment of another person in his place."

We are, therefore, of the opinion that no vacancy exists in the office of sheriff, and the statutes do not give the County Court any power to declare a vacancy. The office of sheriff will continue to function during the absence of the present sheriff by deputy sheriffs.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:HR

BUILDING AND LOAN: Conversion of building and loan associations to Federal institutions--See our opinion dated March 17, 1934.

January 2, 1936.

FILED 58

Honorable Ira A. McBride
Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter dated January 2, 1936, as follows:

> "Under date of March 17th, 1934, pursuant to request of the undersigned, you rendered an opinion advising that a building and loan association, organized and existing under the laws of the state of Missouri, might make a voluntary assignment of its assets to a federal savings and loan association if it obtained the consent of two-thirds of its stockholders and the approval of the supervisor of building and loan associations. You are referred to such opinion for the full text thereof.
>
> "We now desire your opinion as to whether a state chartered building and loan association which has held a shareholders meeting and obtained the consent of two-thirds of its stockholders to make a voluntary assignment of its assets to a federal savings and loan association--that is, what is ordinarily termed 'conversion', will be legally converted upon the undersigned, supervisor of building and loan associations, giving his approval thereto.

> "We assume that such is the case since Justice Cardozo in his opinion in the recent case of Hopkins Federal Association vs. Cleary held that there could be a legal conversion upon compliance with the conditions provided by the state statutes; and the two conditions required by the statutes of Missouri, as pointed out in your opinion of March 17th, are: 1. Consent of two-thirds of its stockholders; and, 2. Approval of the supervisor of building and loan associations."

It is our opinion that " a state chartered building and loan association which has held a shareholders meeting and obtained the consent of two-thirds of its stockholders to make a voluntary assignment of its assets to a federal savings and loan association--that is, what is ordinarily termed 'conversion', will" be legally converted when you, as Supervisor, give your written approval thereto.

In support of the above conclusion we refer you to our opinion dated March 17th, 1934, referred to in your letter, and the case of Hopkins Federal Association vs. Cleary, 56 SUp. Ct. Reporter 235 (U. S. Sup.).

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

TAXATION: Property may be summarily seized and sold, by strictly following the statute, in payment of delinquent personal property taxes.

2-3

January 27, 1936.

FILED
58

Mr. E. A. McDonald,
Prosecuting Attorney,
Mercer County,
Princeton, Missouri.

Dear Sir:

This will acknowledge receipt of your inquiry which is as follows:

> "Sections 12322, 12333 and 12336 authorizes a township collector to enforce collection of taxes 'by distraint and sale of the goods and chattels' of the person who ought to pay the same; but we understand the township collector has no authority to sue and collect on a personal judgment. Now we don't understand just how the township collector shall proceed by 'distraint and sale' of the personal property of the taxpayer. Shall he alone or with the constable or sheriff drive out to the home of the taxpayer and load up some of the furniture or drive off a cow or other personal property, advertise it and sell it?
>
> "Please advise us just how to proceed."

Section 9915, R. S. Mo. 1929, provides as follows:

> "The collector shall diligently endeavor and use all lawful means to collect all taxes which they are required to collect in their respective counties, and to

that end they shall have the power to seize and sell the goods and chattels of the person liable for taxes, in the same manner as goods and chattels are or may be required to be seized and sold under execution issued on judgments at law, and no property whatever shall be exempt from seizure and sale for taxes due on lands or personal property: Provided, that no such seizure or sale for taxes shall be made until after the first day of October of each year, and the collector shall not receive a credit for delinquent taxes until he shall have made affidavit that he has been unable to find any personal property out of which to make the taxes in each case so returned delinquent; but no such seizure and sale of goods shall be made until the collector has made demand for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age. Such seizure may be made at any time after the first day of October, and before said taxes become delinquent, or after they become delinquent: Provided further, that when any person owing personal tax removes from one county in this state to another, it shall be the duty of the county collector (or township collector as the case may be) of the county from which such person shall move, to send a tax bill to the sheriff of the county into which such person may be found, and on receipt of the same by said sheriff, it shall be his duty to proceed to collect said tax bill in like manner as provided by law for the collection of personal tax, for which he shall be allowed the same compensation as provided by law in the collection of executions. It shall be the duty of the sheriff in such case to make due return

> to the collector of the county from whence said tax bill was issued, with the money collected thereon."

Section 1, Laws of Missouri, 1935, page 408, provides:

> "That all penalties and interest on personal and real estate taxes, delinquent for the year 1934 and prior years shall be computed after December 31st, 1934 on the same penalty and interest basis as the taxes delinquent for the year 1934 until paid."

In an opinion written by this office dated July 19, 1935, directed to Hon. Henry C. Salveter, Prosecuting Attorney of Pettis County, Sedalia, Missouri, it was held that:

> "The interest and penalty are both eliminated by the 1935 Act as to such as accrued prior to December 31, 1934, on taxes that were delinquent for the year 1934, i. e., on January 1, 1935, and regardless of whether the taxes became delinquent on January 1, 1935, or any year prior thereto. The tax is paid in full by payment of the original tax and such penalties as would and do accrue on taxes that became delinquent on January 1, 1935, if paid after the 1935 Act became operative on April 29, 1935."

In the case of State ex rel. v. Snyder, 139 Mo. 549, l. c. 555, the court said:

> "There are therefore two different methods provided by statute for the collection of taxes against real estate, viz., one by suit to enforce the State's lien against the land, the other to distrain personal property for 'all taxes.' In re Life Association of America, 12 Mo. App. 40, it was said: 'The right thus given to distrain personal property for "all taxes," as well before as after they have become delinquent, shows that all taxes are personal charges against the owner of the

> property in respect of which they are levied. It is true that a tax is not a mere debt in the sense that a common law action will lie for its recovery. It is an impost levied upon the citizen in invitum; and for coercing its payment the State is limited to the modes pointed out by statute.'"

The court then approvingly quotes from the case of City of Carondelet v. Picot, 38 Mo. 125, as follows:

> "The levying of taxes is a matter solely of statutory creation, and no means can be resorted to to coerce their payment, other than those pointed out in the statute."

In the case of State ex rel. v. Sargent, 12 Mo. App. 228, l. c. 237, the court said:

> "Nor does the law allow the collector to seize personalty for taxes without notice to the party liable, given in person, or by leaving a copy with his family at his residence * * *, which in case of non-residents seems impossible."

In the case of DeArman v. Williams, 93 Mo. 158, in speaking of the constitutionality of this law, the court said, l. c. 163:

> "The point made, that the tax bill issued under this statute is not 'due process of law,' is not well taken. The mode of levying and collecting taxes is a matter confided to the legislative power, and such laws are 'laws of the land.' * * * This statute operates alike upon all persons who, owing a personal tax, move from one county to another, and is not open to the objection made to it."

While Section 9915, supra, has apparently been held constitutional, and while on the face of it it points out a course of procedure which the collector is authorized to pursue

in selling personal property for the payment of personal taxes, the law requires that it be strictly followed. The assessment must be made within the time set forth by said statute, and demand must be made by the collector for the payment of the tax, either in person or by deputy, to the party liable to pay the same, or by leaving a written or printed notice at his place of abode for that purpose, with some member of the family over fifteen years of age. The courts have held that this method of making demand is not complied with by mailing a letter to the delinquent taxpayer.

There is a scarcity of decisions in Missouri construing this section of the statutes.

In the case of National Lumber & Creosoting Co. v. Burrows, 284 S. W. 153, which was an action in trespass for damages claimed because of summary distraint proceedings by the collector, the plaintiff admitted receiving the notice of levy or seizure, but the court declined to hold that that is sufficient compliance with the statute which requires demand prior to the seizure, and said, l. c. 154:

> "But if it be assumed that defendant made demand by mail, and that the written demand was received by plaintiff, is such demand sufficient under the statute?
>
> "The statute provides that no seizure shall be made until the collector has made demand for the payment of the tax, either in person or by deputy or by leaving a written or printed notice at the place of abode of the taxpayer with some member of the family over 15 years of age. May the demand be made by mail? So far as we are able to ascertain section 12907 has not been specifically construed by an appellate court respecting the question before us. In State ex rel. v. Sargent, 12 Mo. App. 228, loc. cit. 237, in the course of the discussion of the question there under consideration the court used this language:
>
> "'Nor does the law allow the collector to seize personalty for taxes without notice to the party liable, given in person,

or by leaving a copy with his family at his residence (Rev. Stats. Sec. 6754), which in case of nonresidents seems impossible.'

"In O'Neal v. Woodmen of the World, 130 Ky. 68, 113 S. W. 52, the court construed the phrase 'in person' as used in the constitution of the society. The constitution provided that there would be no liability under a certificate or policy until the insured 'shall have delivered to him "in person" his beneficiary certificate while in good health.' When the insured's certificate came to the clerk, it was discovered that there was an error as to the number of the local camp. Insured was directed to appear for initiation and was regularly initiated and paid all dues and assessments, but the clerk returned the certificate for correction. Before the corrected certificate was returned and delivered to the insured he was killed. The court ruled that the phrase 'in person' as there used did not mean that the certificate must be placed in the manual possession of the insured, and, in considering the proper construction to be given the phrase in person, used this language:

"'It has often been held that the placing of insurance policies or deeds in the mail, directed to those for whom intended, was a valid delivery, and therefore the words "in person" were inserted after the word "delivered" to cut off such delivery as that of which we are speaking and confine it to the insured in person.'

"The levying of taxes is a matter solely of statutory creation and no means can be employed to coerce payment other than those pointed out in the statute. City of Carondelet v. Picot, 38 Mo. 125. By section 12932, R. S. 1919, personal taxes constitute a debt, and under that section and the attachment law defendant had ample remedy to enforce collection

> of the taxes he sought to collect without resorting to summary seizure; also under section 12932 it is provided that the collector shall in no case be liable for costs.
>
> "The demand required by section 12907 can only be made in the manner prescribed, and the difficulty or impossibility of making the demand cannot justify a reading of something into the statute that would run counter to sound reason. We are constrained to rule that the demand can be made only as the statute prescribes, and, since demand by mail is not prescribed, such a demand is in effect no demand.
>
> "The judgment should be reversed, and the cause remanded, and it is so ordered."

It will be noted that the court in 1926 said:

> "So far as we are able to ascertain section 12907 has not been specifically construed by an appellate court respecting the question before us."

Section 12907 of the 1919 Statutes there under consideration was the same as Section 9915, R. S. Mo. 1929.

The court in that case discouraged resort by the collector to the summary method of collecting personal taxes provided by Section 9915, R.S. Mo. 1929, and stated that by Section 12932, R. S. 1919, which is Section 9940 of the 1929 Revision,

> "personal taxes constitute a debt, and under that section (12932, R. S. 1919) and the attachment law defendant had ample remedy to enforce collection of the taxes he sought to collect without resorting to summary seizure."

The provisions of Section 9940, R. S. Mo. 1929, are in consonance with the general procedure of a course that should be followed in recovering property from a person, and it appears to us that the course therein set forth is preferable to that set forth in Section 9915.

It will be noted that under the provisions of the law with respect to counties which are under township organization, Section 12312, R. S. Mo. 1929, provides that the county treasurer of such counties shall be ex officio collector and have the same power to collect all delinquent personal property taxes, and prosecute for and make sale thereof, "the same that is now or may hereafter be vested in the county collectors under the general laws of this State."

CONCLUSION

It is our opinion that the procedure set forth in Section 9915, R. S. Mo. 1929, is a proper method of summarily selling personal property belonging to a delinquent taxpayer for the payment of delinquent taxes, and that the same has been held constitutional; and further the township collector in counties that have township organization, by literally following the provisions of Sections 12332, 12333 and 12334, R. S. Mo. 1929, is authorized to so summarily seize and sell the delinquent taxpayer's property to satisfy his delinquent taxes. In order to do so, though, such township collector must first "call at least once upon the person taxed at his or her place of residence, if in the township for which such collector has been chosen, and shall demand payment of the taxes charged to him or her, on his or her property," and if not then paid, he is thereupon authorized by Section 12333 to "levy the same by distraint and sale of the goods and chattels", and shall give public notice of the time and place of sale, and of the property to be sold, at least fifteen days previous to the sale, by advertisement to be posted up in at least three public places in the township where such sale is to be made, and the sale shall be by public auction.

It is our further opinion that said sections and the provisions thereof must be literally and strictly followed in order for such sale to stand the test of the courts; that said sections provide a summary method of depriving a person of his property, and the use thereof is discouraged by the court in

the recent 1926 decision thereon, and that the more desirable course to follow is defined by Section 9940, R. S. Mo. 1929.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

BUILDING & LOAN: By-law disapproved because it permits the loan of funds to members without the pledge of shares of stock.

2-19

February 17, 1936.

FILED
58

Hon. J. W. McCammon
Chief Clerk
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This is to acknowledge your letter dated February 14, 1936, as follows:

> "We would like to have an opinion as to whether the following by-law, submitted to us for our approval, is legal:
>
> "'When there are more funds on hand at any regular or special meeting to meet the requirements of the borrowers, as provided in Sec. 8, then the Board of Directors, in their discretion, may loan such funds without the pledge of stock security, or with the pledge of a lesser number of shares than required in the above Section 8, such loans to be known as straight loans or split loans.'
>
> "Awaiting your early reply, I am"

Section 5594, Laws of Missouri, 1931, provides in part as follows (page 149):

> "The moneys accumulated from payments on account of stock * * * * * * * * *

> may, at times provided in the by-laws, be offered to such shareholders or shareholder who shall bid the highest premium for the preference or priority of right to have a loan or advance of a sum equal to the ultimate value of one or more of his or their respective shares; and such shareholders so bidding the highest premium as aforesaid shall be entitled to receive a loan or advance * * *

Laws of Missouri, 1935, page 204, Section 5597, provides for the security for loans or advances made to members, and in part provides as follows:

> "Provided, however, that the shares of the particular corporation without other security, may, in the discretion of the board of directors, be accepted as security for loans or advances, to an amount not exceeding nine-tenths of the withdrawal value of such shares at the time, as shown by the books of such association.
>
> * * * * * * * * * * *
>
> And provided further, than an association shall be permitted to make real estate loans to its members on a plan or plans requiring periodical direct reduction of the principal of the loan; and that any loan so made with which any number of shares of stock of the association is pledged shall be for all purposes a loan to a member, and that the proportion that the number or total amount in dollars of all such loans may bear to the number or total amount in dollars of all loans shall not impair or affect mutuality."

The by-law submitted for your approval is ambiguous. If the association has a balance of undisposed funds and desires to loan same to non-members, then the by-laws should so state. If the association desires to loan to members on real estate, then "said note or bond and mortgage or deed of trust shall recite and set forth the number of shares transferred and pledged by the particular shareholders so borrowing." Section 5597, supra.

You will note that the proposed by-law provides in part as follows:

> "* * *the Board of Directors, in their discretion, may loan such funds <u>without the pledge of stock security,</u> * * * *"

A loan to a member on real estate must be accompanied by a pledge of some stock; the amount of stock to be pledged being a question for determination by the association, in view of Section 5597, supra. As said proposed by-law would permit the loan of funds to members without the pledge of stock security, it would be violative of Section 5597, supra. Consequently, it should be disapproved.

If an association desires to loan funds to only its members, then some shares of stock must be pledged. However, if an association desires to loan to other than shareholders on prime encumbered real estate, then, of course, no shares of stock need to be pledged. The by-law proposed would, in our opinion, permit the association to loan its funds to persons other than shareholders and would also permit the loaning of funds to shareholders without the pledge of some stock security, and in view of the ambiguity of said by-law your approval should be withheld and the association notified that you were expressly disapproving said by-law, and request a clarification thereof.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

OLD AGE PENSIONS: Members of Old Age Assistance Board only entitled to necessary expenses actually incurred, not to exceed for board and lodging the amount fixed by Old Age Assistance Division. Not to receive over five cents per mile for using their own car.

March 13, 1936

3-16

FILED
58

Mr. Wm. McClanahan
Chairman County Old Age Assistance Board
Sullivan County
Milan, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "Mr. George Rinehart, representative of Sullivan County, has informed us that members of the Old Age Assistance Board are entitled to 10 cts per mile and $1.25 a day for expenses.
>
> "We have been shortchanged if this be true. I have even been out money in making an honest effort to do what is required under the law. I will appreciate it if you will advise me at once how much each member may expect to draw under the law.
>
> "I am writing for all members and thank you for a reply."

Section 3 of the Old Age Assistance Act, Laws of Missouri, 1935, page 309, provides:

> "In every county there shall be

> established a County Old Age Assistance Board, to consist of three persons domiciled in the county, each of whom shall have been a resident taxpaying citizen of the county for a period of five years prior to his or her appointment at least one of whom shall be a woman, who shall be appointed by the county court for a term of four years, except that of the members first appointed, one shall be appointed for a term of two years, and one for a term of three years. Vacancies shall be filled in the same way in which the original appointment was made. The members of the county board shall serve without compensation, except that the necessary expenses incurred while in the performance of their duties shall be paid to them."

Section 11405,Revised Statutes Missouri 1929, regulates the expense accounts of persons traveling on business for the State. Said Section reads as follows:

> "Whenever any official, employe or any other person shall travel at the public expense of the state and is paid or reimbursed from any public funds derived from taxes, fees, licenses, or in any other manner prescribed by law, the provisions herein set forth shall govern and no other.
>
> "(a) Before any person shall travel at the public expense as herein provided, such person shall have from the head of the department on whose account the travel is made a written authority stating the nature of the duty to be performed and the counties or places to be visited, provided

that in the case of a person whose general duties require traveling a general authority for one year may be issued stating the general duties of such employe.

"(b) This written authority shall state the maximum amount per diem that may be expended for board and lodging. The head of the department shall fix this amount at a just and reasonable figure based upon the duties of the person traveling and the nature of the duties to be performed and the state auditor in auditing such an account is hereby authorized to pass upon the reasonableness of the amount allowed by the authority.

"(c) Before any payment or reimbursement is made to any person on account of any traveling expenses, the original written authority provided herein shall be filed with the state auditor. All claims for reimbursement shall be submitted to the state auditor upon a form approved by him, which form shall contain the information herein provided. It shall be made out in duplicate and the original shall be sworn to by the person claiming payment or reimbursement, and the original shall remain in the files of the state auditor and the duplicate shall be retained in the files of the department granting the authority. The form shall contain the following information and in addition such other information as the state auditor may deem necessary and shall be uniform for all departments; Date and place expense was incurred. If account is for more than one day, it shall be itemized showing the amount of each day's expense and the purpose for which each day's expense was incurred. Transportation charge, sleeping-car fare, lodging and meals shall each be shown as separate items and the amount for each stated. If any item of expense exceeds

> one dollar ($1.00), it shall be supported by a sub-voucher or receipt signed by the person to whom payment was made by the official, employe or person traveling at the public expense as herein provided and such sub-voucher or receipt shall show in detail the information required by this section.Also the place and date. No official, employe or person traveling at the public expense shall submit any voucher or claim for partial payment or reimbursement on account of traveling expenses but such a voucher or claim must contain all and every expense incurred within the time it purports to cover. The oath or affirmation of the official, employe or person traveling at the public expense shall be in the following form:
>
> "I, _____, do solemnly swear,'or affirm' the above claim is correct and just, that no part of the same has been paid, that the expense was necessary to the public business of the state, that payment was made out of personal funds and that I have not been reimbursed therefor, and I have not received and will not receive from any source whatever any payment of any part thereof except as provided by law. "

From your letter it appears that you assume that you are entitled to a specified amount for expense incurred while performing the duties of your office, and also a certain amount per mile for traveling expense. A reading of the above sections will show you that this is not true. All that a member of the County Old Age Assistance Board is entitled to receive is the necessary expenses actually incurred by him while performing his duties.

Sub-section (b) of Section 11405, supra, makes it the duty of the head of a department to fix the amount to be ezpended for board and lodging by a person traveling at the State's expense. The Old Age Assistance Division,

according to our information, fixed the maximum amount to be expended by a member of the County Old Age Assistance Boards for meals at one dollar ($1.00) per day. In an opinion given by this department to Mr. Arthur C. Mueller, Prosecuting Attorney, Hermann, Missouri, under date of October 10, 1935, we ruled:

> "the members of the County Old Age Assistance Board are only entitled to the necessary expenses incurred for meals while performing their duties not to exceed the maximum amount fixed by the Old Age Assistance Division."

A copy of said opinion is herewith inclosed.

The maximum amount which the auditor's department will allow a person traveling at the State's expense in his own car is five cents a mile; this amount has been ruled by them to be the reasonable amount of expense incurred by a person so traveling.

In view of the above, it is the opinion of this department that a member of a County Old Age Assistance Board is only entitled to the necessary expenses actually incurred by him while performing his duties.

It is our further opinion that the Old Age Assistance Division has a right to fix the maximum amount to be expended by such members for meals and lodging, and that the maximum amount which they are entitled to receive for traveling expenses while using their own car is five cents per mile.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

PHYSICIANS: STATE BOARD OF HEALTH: May institute proceedings to revoke license on complaint of any citizen.

May institute proceedings upon information without complaint having been filed.

January 13, 1936

FILED 59

E. T. McGaugh, M. D.
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this department, which reads as follows:

> "Is it legally right for the Board or any member of the Board to file charges against offending licensed practitioners of medicine with a view to revoking a license or must this be done by some citizen not a member of the Board?"

Section 9120, Revised Statutes Missouri 1929, which authorizes the State Board of Health to revoke licenses to practice medicine, reads, in part, as follows:

> "The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and they may revoke licenses, or other rights to practice, however derived, for like causes, and in cases where the license has been granted upon false and fraudulent statements, after giving the accused an opportunity to be heard in his defense before the board as hereinafter provided. Habitual drunkenness, drug habit or excessive use of narcotics, or

> producing criminal abortion, or soliciting patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of this section. At least twenty days prior to the date set for any such hearing before the board for the revocation of such license, the secretary of the board shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original writs in civil actions. Said notice shall contain an exact statement of the charges and the date and place set for the hearing before the board.
>
> * * * * * * * * "

The above section does not require that a complaint or charge be filed against a licensee to practice medicine with the State Board of Health, before a proceeding is instituted to revoke such licensee's license, but only requires that the secretary of the board shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original writs in civil actions, and that said notice shall contain an exact statement of the charges and the date and place set for the hearing before the board.

In the case of State ex rel. Hurwitz v. North, et al. 264 S. W. 678, the right of the State Board of Health to institute proceedings to revoke a license on the complaint of the prosecuting attorney was questioned. At l. c. page 680, the court said:

> "The first attack made by relator upon the record of the state board of health is that the complaint purports to be filed by the prosecuting attorney, and that there is no authority in law for that officer to file such. The statute doesnot say by whom such complaints may be made. It contains no limitations in this regard.

* ** * * * * * * * * * * * *

> "So in the case at bar. It may be true that the statute fixed the duties of a prosecuting attorney, and they do not cover a complaint of this kind, in his official capacity. The complaint in this case does not appear to be upon his oath of office as prosecuting attorney, except by the language following the name, which can be considered either as surplusage or as a mere description of the person. We feel that the complaint and charges as made were (so far as this contention is concerned) sufficient to properly invoke the jurisdiction of the state board of health. The statute is certainly broad enough to permit any citizen to prefer the charges, and a person is not deprived of citizenship by occupying the office of prosecuting attorney."

In the case of Horton v. Clark 293 S. W. 362, a complaint filed by the State Board of Health against a licensee to practice medicine was attacked on the ground that it was not verified by the oath of the complainant. The Supreme Court, en banc, held that a proceeding to revoke a license to practice medicine need not be instituted by the filing of a verified complaint or by the filing of any complaint whatever. The court further held that the Board of Health may act upon any information from whatever source and however communicated which it may deem trustworthy, and that it is only necessary that the written notice required by statute "contain an exact statement of the charges. The court, at l. c. page 363, said:

> "The first point made against the complaint is that it was not verified by the oath of the complainant. The contention is based upon precedents to the effect that, regardless of statutory requirements, proceedings for the disbarment of an

attorney at law must be instituted by verified information. Those precedents are not binding or even persuasive in a case such as this. Disbarment proceedings are not governed exclusively by statute. Independent of any statute on the subject, courts have the inherent power to disbar attorneys; and a statute, where there is one, is not regarded as restrictive, but merely as declaratory of the common law so far as it goes. State v. Gebhardt, 87 Mo. App. 542,548. The power to revoke the license of one who is thereby authorized to practice medicine and surgery, on the other hand, does not exist apart from statute. In this state the statute (section 7336, R. S. 1919) is not only the sole source of the power to revoke, but it prescribes and regulates exclusively the procedure to be followed in the exercise of the power. Looking, then, to the statute, we find no requirement that a proceeding to revoke a license to practice medicine shall be instituted by the filing of a verified complaint, or by the filing of any complaint or information whatever. Evidently it contemplates that the state board of health may act upon any information, from whatever source and however communicated, which it may deem trustworthy. It is only necessary that the written notice provided for 'contain an exact statement of the charges.' "

CONCLUSION

In view of the above, it is the opinion of this

department that the State Board of Health may institute a proceeding to revoke a license to practice medicine on the complaint of any citizen. It is our further opinion, however, that the State Board of Health may institute proceedings to revoke a license upon any information they may have obtained, regardless of from whom received or how communicated, and it is not a prerequisite that a complaint has been filed with them. It is sufficient if the licensee against whom the charges are made is served with the written notice provided for in Section 9120, supra, and that such notice contain an exact statement of the charges against such licensee.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

STATE BOARD OF HEALTH:

PHYSICIANS AND SURGEONS: Procedure for revocation of license.

1-29

January 24, 1936

FILED 59

E. T. McGaugh, M. D.
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "In Re: MUENCH BABY CASE
>
> "At the Board meeting of January 6, 1936, after reviewing the Court's findings in the Muench baby case, motion was made, seconded and carried that the question of citing Dr. Ludwig O. Muench to appear before the Board for signing a fraudulent birth certificate be referred to the Attorney General for his opinion as to what procedure the Board should follow.
>
> "Will you kindly advise us as to your opinion and recommendation in regard to proper procedure with reference to the Dr. Muench case."

If the State Board of Health desire to institute proceedings to determine whether or not Dr. Ludwig O. Muench's license to practice medicine should be revoked, they should, of course, proceed as in any other case. The Board has for the past several years instituted many such proceedings and conducted numerous hearings to revoke licenses to practice medicine. In view of this, it appears to us that your re-

quest is unnecessary. The responsibility rests with the Board to determine whether or not theinformation at hand is sufficient to justify the institution of the proceeding. For the Board to cite every doctor against whom a whispered suggestion of unprofessional conduct is made would be unthinkable. The Board, in performing the duties placed upon it by law, must determine which cases justify further proceeding. No duty rests on this office to recommend that action be taken in any given case. However, it becomes our duty upon your request to point out the proper procedure for the Board to follow in instituting proceedings and conducting hearings.

Section 9120, Revised Statutes Missouri 1929, gives the Board authority to revoke licenses. This section reads as follows:

> "The board may refuse to license individuals of bad moral character, or persons guilty of unprofessional or dishonorable conduct, and they may revoke licenses, or other rights to practice, however derived, for like causes, and in cases where the license has been granted upon false and fraudulent statements, after giving the accused an opportunity to be heard in his defense before the board as hereinafter provided. Habitual drunkenness, drug habit or excessive use of narcotics, or producing criminal abortion, or soliciting patronage by agents, shall be deemed unprofessional and dishonorable conduct within the meaning of this section. At least twenty days prior to the date set for any such hearing before the board for the revocation of such license, the secretary of the board shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original writs in civil actions. Said notice shall contain an exact statement of the charges and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place

designated in said notice, the board shall, after receiving satisfactory evidence of the truth of the charges and the proper issuance and service of notice, revoke said license. If the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider depositions and oral statements and shall cause stenographic reports of the oral testimony to be taken and transcribed, which, together with all other papers pertaining thereto, shall be preserved for two years. If a majority of the board are satisfied that the licentiate is guilty of any of the offenses charged, the license shall be revoked for such period of time as may be agreed upon. Any person whose license has been or shall be revoked by the board shall have the right to have the proceedings of said board revoking his license and all the evidence therein reviewed, on a writ of certiorari, by the circuit court of the county in which said board held its session when said license was revoked. Said writ shall issue upon the petition of the person whose license shall have been revoked to said court or to the clerk thereof in vacation at any time within ninety days after such revocation, and shall command the said board and the secretary thereof to certify to said court the record and proceedings of said board, and a complete transcript thereof, and of all the evidence therein pertaining to the revocation of said license. The petitioner for the writ of certiorari shall set forth the rights of the petitioner and the injuries complained of by him and shall be verified by him. If the proceedings of the board shall be sustained or upheld by the circuit court, its orders, decisions

> or judgments revoking said license shall remain and continue in full force and effect.And any such license so revoked by the board shall, pending said review on certiorari, stand revoked and so remain until the proceedings of the board relating thereto shall be quashed or otherwise annulled by the circuit court on said writ of certiorari. Testimony may be taken by deposition,to be used in evidence on the trial of such charges before the board in the same manner and under the same rules and practice as is now provided for the taking of depositions in civil cases."

Although the foregoing statute specifies certain causes for which licenses may be revoked, yet the enumeration there contained is not exclusive. This is recently held in the case of State ex rel. Lentine v. State Board of Health 65 S. W. (2d) 943. At page 950 the Court stated in the course of that opinion as follows:

> "In particularizing that habitual drunkenness, drug habit, or excessive use of narcotics, criminal abortion, and soliciting patronage by agents shall be deemed unprofessional and dishonorable conduct, we do not, in view of the broad intendments found in the preceding general language, think that the Legislature intended to thereby exclude all other acts or conduct affecting the practice of medicine and the moral conduct of the physician, in that connection, which by common opinion and fair judgment are found to be in their very nature unprofessional and dishonorable, as grounds or cause for revocation of a license. Rather upon a showing of any of the things enumerated the board of health, and the court upon review, is not called upon in its sound discretion to determine whether such conduct is such as in common judgment is deemed unprofessional and dishonorable, for the statute has expressly declared it so to be. It would not be practicable to

> the carrying out of the wholesome purpose of the statute to undertake to catalogue, list, or specify each and every act or course of conduct which would, or under what circumstances, constitute bad moral character or unprofessional and dishonorable conduct, and we do not think the Legislature intended to do so. The amendment of 1919, as we have observed, might logically be taken to indicate a purpose to be rid of the seeming restriction and limitation which the court had placed upon the statute in its construction of the language stricken out and to permit the statute to operate as to acts other than those named which in their nature are, and by common opinion deemed, unprofessional and dishonorable. So far as State ex rel. Spriggs v. Robinson, supra, is not in accord with what is said herein, it should no longer be followed."

Likewise, it has been held that although the act charged may constitute a violation of the criminal code, a prosecution under such code is not a legal prerequisite to a proceeding by the board to revoke the license. Such was the holding in the case of State ex rel. Conway v. State Board of Health, 266 Mo. 244, l. c. 269:

> "It needs no citation of authorities to demonstrate that appellant's conduct aforesaid, as disclosed by the undisputed facts in the record, was both unprofessional and dishonorable. In addition to the foregoing, every prescription of the above character which appellant signed as physician and delivered, and upon which whiskey was obtained as a beverage, constituted a crime against this State.

Section 5784,Revised Statutes 1909, reads as follows:

> 'Any physician, or pretended physician, who shall make or issue any prescription to any person for intoxicating liquors in any quantity, or for any compound of which such liquors shall form a part, to be used otherwise than for medicinal purposes, or who shall issue more than one prescription at the same time to any one, for intoxicating liquors, or for any compound of which such liquors shall become a part, or who shall make or issue any prescription contrary to any existing law, shall be deemed guilty of a misdemeanor, and upon conviction be punished by a fine of not less than forty nor more than two hundred dollars.'

> While appellant might have been successfully prosecuted under the statute last quoted, it does not militate in the least against the right of the State Board of Health, under the circumstances detailed in this record to revoke his license."

It is plain from a reading of Section 9120, supra, that a jurisdictional requirement is the service of written notice upon the licensee at least twenty days before the hearing is held. Such notice must be served in the manner prescribed for the serving of writs in civil actions and must contain an exact statement of the charges made and the date and place of the hearing. If the party fails to appear pursuant to the notice the board may proceed to hear the evidence so as to determine the truth of the charges, being first satisfied that proper notice has been served. If the evidence is, in the judgment of the Board, sufficient to warrant a revocation of the license, the Board may so order. If the licensee appear, either in person or by counsel, the Board shall proceed with the hearing. The Board may receive and consider depositions, oral statements and documentary evidence, and cause a stenographic report of the' proceeding to be taken and preserved.. If a majority of the Board are satisfied that the licensee is guilty of any of the offenses charged, the license shall be revoked for such period of time as may be agreed upon. The Board has no power to

subpoena witnesses, but testimony may be taken by depositions and used in evidence on the trial of such charges before the Board.

In an opinion given to you, under date of January 13, 1936, this department ruled that the State Board of Health may institute proceedings to revoke a license to practice medicine on the complaint of any citizen. We ruled further that the State Board of Health may institute proceedings to revoke a license upon any information they may have obtained, regardless of from whom received or how communicated, and that it was not a prerequisite that a complaint be filed. We ruled further that it was sufficient if the licensee against whom the charges are made is served with the written notice provided for in Section 9120, supra, and that such notice contain an exact statement of the charges against such licensee. In construing this provision, the Supreme Court stated, in the case of State v. Landwehr 32 S. W. (2d) l. c. 85:

> "Section 7336 provides that, in a proceeding to revoke a physician's license, the notice served on him shall be in writing, and shall contain an exact statement of the charges and the place and date set for the hearing. The statute is to be interpreted as denying the board the right or power to revoke a physician's license, except upon notice and hearing and with an opportunity to defend. Blunt v. Shepardson, 286 Ill. 84, 121 N. E. 263; People v. McCoy, 125 Ill. 289, 17 N. E. 786; State v. Schultz, 11 Mont. 429, 28 P. 643; People v. Reid, 151 App. Div. 324, 136 N.Y. S. 428."

The State Board of Health is not a judicial body and the technical rules of procedure applicable to a judicial trial need not be followed by the Board in conducting a hearing. The Supreme Court so held in the case of State ex rel. Ball v. State Board of Health 26 S. W. (2d), l. c. 777:

> "In addition to the foregoing, it may be said that an investigation by the State

> Board of Health is not a lawsuit,and the technical rules of procedure applicable to a judicial trial need not be followed. In State ex rel.Goodier, 195 Mo. 551, 559, 93 S. W. 928, 929, we said:'The state board of health is not a court - is not a judicial tribunal. It can issue no writ. It can try no case - render no judgment. It is merely a governmental agency, exercising ministerial functions. It may investigate and satisfy itself from such sources of information as may be attainable as to the truth or falsity of charges of misconduct against one holding one of its certificates, but its investigation does not take on the * * * character of a judicial trial. * * * To guard and protect the health and welfare of its people the state must have its ministerial agents or officers and intrust them with power; if every administrative act that looks to the enforcement of the law should be required to be reduced to the compass of a law suit and be put into effect only after a court had at the end of a formal trial stamped its judgment upon it."

The Board should, however, be governed by the rules of legal evidence in admitting and passing upon testimony at such hearings.

In the case of State ex rel. Johnson v. Clark 232 S.W. l. c. 1034, the Court said:

> "Moreover, respondents cannot act arbitrarily, nor against the rules of evidence. State ex rel. McCleary v. Adcock, 206 Mo. loc. cit. 558, 105 S. W. 270, 121 Am. St. Rep. 681. The declaration attributed to the deceased young woman was not made under an impression of impending

and immediate death, as is evidenced by the decisively negative answer of Dr. Jose to the question:

" 'Say anything about that she realized the end was near, or say anything about dying,'

"That being true, the statement would unquestionably, under the rules of evidence, have been inadmissible in a criminal proceeding before a court.* * *. And we see no just reason and find no precedent to the contrary in this state, as to why a similar rule should not prevail in a hearing before the State Board of Health, when a valuable privilege, if not a property right, depends upon the outcome of that hearing. To let down the bars and admit uncorroborated hearsay testimony, which the record here discloses constitutes the only possible positive evidence upon which the order of the board can be predicated, is not consistent with the practice which should be followed in inquiries of even a quasi judicial nature."

CONCLUSION

In view of the above we summarize our conclusions as follows:

In instituting a proceeding to revoke a license to practice medicine at least twenty days' written notice must be personally served upon the licensee, in the manner prescribed for the serving of original writs in civil actions. The notice must contain an exact statement of the charges against the licensee and the date and place set for the hearing. The Board may institute such proceedings on the complaint of any citizen, or on information they have obtained, regardless

of from whom received or how communicated. At the hearing the licensee has a right to appear and defend against the charges made against him. He is entitled to appear, in person and by counsel, to cross-examine the witnesses against him and to introduce evidence in his own behalf. The State Board of Health is not a judicial body and the technical rules of procedure applicable to a judicial trial need not be followed in conducting a hearing. However, the Board should be governed by the rules of evidence in admitting and passing upon testimony at such hearings. If the licensee, after being duly cited, fails to appear before the Board at the time and place designated, or does appear in person or by counsel, a majority of the Board may, if there is satisfactory evidence of the truth of the charges, revoke said license for such period of time as they may agree upon.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

COUNTY BUDGET ACT - At close of fiscal year the county court may transfer surplus funds and pay accounts arising during the year under Sec. 12167, R.S. Mo. 1929.

January 28, 1936.

FILED 59

Honorable C.W. McKim,
County Clerk,
Worth County,
Grant City, Mo.

Dear Sir:

This department is in receipt of your letter of January 22, wherein you make the following inquiry:

> "In Worth County we have about $157,000 indebtedness which is represented by warrants written from 1930 to 1933. In 1935 early in the year, in January, I think, all 1934 warrants were paid, leaving a balance in cash which was transferred to the Old County Revenue and Bridge Fund and then was used to pay off old warrants which I understand is according and in harmony with the County Budget Law. However, after the first of the year, in 1935, some old bills began to show up in the office here; I have never been sure just what to do with them. Now then at this present date we have the same thing happening along with the bills we had left over from 1934 we have some 1935 bills showing up. It is about the disposition of these that I am asking.
>
> "Last year there was left in the budget something like $500.00, that is for 1935. But it seems now there will be a cash balance for the year 1935 considerably larger than this amount. Now then we have perhaps $1500.00 in bills that have showed up against 1935. Would it be legal to issue warrants to pay

> these bills on the cash balance left over from 1935 revenue after all warrants that were issued in 1935 have been called and paid?
>
> "We are making up our budget for 1936 at this time and I had the understanding that an old bill could be listed in the budget for the coming year and then be paid at the first pay day in February; however, if they could be issued against the cash balance before that balance is used to pay off old warrants, it would be more convenient to this office and to the county court. * * *"

To state your question briefly and concisely, it is: Can the excess or surplus remaining after all classes under the County Budget Act have been adequately provided for and all outstanding warrants have been paid, be used to pay accounts which have arisen during the year 1935?

Section 4 of the County Budget Act (Laws of Mo. 1933, page 343), same relating to the duties of the county clerk, lists the following items:

> "Cash balance in county revenue fund January 1 of current year;
>
> "Net cash balance on hand January 1st of current year;"

and under the hearing of "Estimated Receipts", lists the following:

> "Cash on hand (as shown above) not obligated, January 1st of current year."

Bearing in mind that it is the duty of the county court at the regular February term to prepare and enter of record and file with the county treasurer and the State Auditor a budget of estimated receipts and expenditures for the year beginning January 1 and ending December 31 as provided in Sec. 1 of the County Budget Act (Laws of Mo. 1933, page 341), within the next ten days these acts must be performed by your county court.

We shall now discuss the unpaid bills for 1935. The Act, Section 2 (Laws of Mo. 1933, p. 341) provides for the classification of proposed expenditures and makes each class a priority over each succeeding class. The first five classes are definite in their purpose; the sixth class provides as follows (page 342):

> "After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under Class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under Class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under Class 6."

You state in your letter, "But it seems now there will be a cash balance for the year 1935 considerably larger than this amount", and "we gave perhaps $1500.00 in bills that have showed up against 1935". You further state "all warrants issued in 1935 have been called and paid". Now, if this be true and all the five definite classes have been adequately provided for, their priorities sacredly preserved, it is our opinion that ordinarily the funds could be transferred to Class 6, provided there are no outstanding warrants. However, you state in your letter that Worth County has an indebtedness of about $157,000 represented by warrants written from 1930 to 1933. Therefore, due to these outstanding warrants, we do not believe that you could pay the accounts from excess funds for the current year of 1935 by transferring the funds to Class 6.

We have construed Section 12167, R.S. Mo. 1929 not to be repealed by the County Budget Act; hence, it is further applicable to surplus funds, said section being as follows:

> "Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

We assume that the $1500, representing accounts for the year 1935, should have been classified among the five classes, if they had been taken into consideration at the time the budget was prepared for the year 1935. Your letter contains no explanation as to why or in what manner the bills totaling approximately $1500 arose, or why the same were not anticipated as expenditures when the budget was prepared in February, 1935. Ordinarily the decision in the case of State ex rel. v. Johnson, 162 Mo. 621, would prevail and the surplus cash on hand used to take care of outstanding warrants of former years. In that case the court said (l.c. 631-632):

> "This section then had been the law of this State for twenty years before the adoption of the Constitution of 1875. Prior to that, it was not necessary that a county warrant should be drawn upon a special fund or that it should come to the holder during the year in which the indebtedness was created. What, then, was the effect of the Constitution upon this section? As was ruled in Andrew County v. Schell, 135 Mo. 31, and State ex rel. v. Payne, 151 Mo. 670, that section was modified by the Constitution to the extent that thereafter the warrants drawn by the county court in any year to meet all the necessary and current expenses for that year must first be paid in full in the order of their registration, and if a surplus was left, then the section operated on all other warrants just as it had previous to the adoption of the Constitution of 1875. In a word, that section, in so far only as it conflicted with the provisions of section 12 of article 10 of the Constitution, became inoperative by force of the Constitution as soon as it went into effect because inconsistent therewith. But with this exception there is no such repugnancy as requires us to hold it was absolutely repealed, the rule of construction being that before it shall be construed as repealed by implication only, the two must be so repugnant that both can not stand, and, we think, with the modification we have mentioned, both can stand. Such has been the opinion of the Legislature, we think, from the fact that this section has been preserved through three revisions

since the adoption of the Constitution. We conclude that this surplus, after the current expenses for the years 1895 and 1896 had all been paid, at once became subject to this general statute, section 3166, Revised Statutes 1889, which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 6771, Revised Statutes 1899, provides the rule of priority, just as it did before its modification by the Constitution of 1875, and the surplus is not to be distributed pro rata."

CONCLUSION

We are of the opinion that the surplus cash which you now have on hand can be transferred, this being the close of the fiscal year, to any of the five classes under which the unpaid current accounts of 1935 can be legally classified, and that the surplus funds could be transferred to the various classes for payment of the same in accordance with Section 12167, supra. This conclusion, however, is on condition that all of the items composing the $1500 current accounts occurred in 1935; otherwise, the decision in the case of State ex rel. v. Johnson, supra, would govern.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

HEALTH: Board of Health may require by rule Director of Cosmetology and Secretary to give surety bond before entering upon discharge of their duties.

February 10, 1936.

2-11

FILED
59

E. T. McGaugh, M. D.,
State Health Commissioner,
Jefferson City, Missouri.

Dear Doctor McGaugh:

This is to acknowledge your letter dated February 6, 1936, as follows:

> "I am writing for an opinion relative to the following:
>
> "Since much money is handled in the Cosmetology and Hairdressing Department, please advise me if it is necessary for the Director of the Department of Cosmetology and Hairdressing to carry a surety bond.
>
> "Also, is it necessary that the Secretary to the Director of Cosmetology and Hairdressing carry a bond?"

Article 5, Chapter 52, R. S. Mo. 1929, and amendments, pertain to "Cosmetologists, Hairdressers and Manicurists" and Section 9093, R. S. Mo. 1929, provides as follows:

> "The control, supervision and enforcement of the terms and provisions of this article shall be under the state board of health, or by whatever name said board may hereafter be designated."

Nowhere does Article 5, Chapter 52 provide for a Director and a Secretary to said Director. We presume that such are employed by virtue of Section 9093.

As Article 5 does not provide for the employing of a Director of Cosmetology and a Secretary, neither does it provide for the giving of a bond by such, if employed. If the Board of Health appoints a Director of Cosmetology and a Secretary to said Director, then, of course, the Board could require a bond from said persons. It would be our opinion that if the Board of Health required the Director of Cosmetology and Secretary to have a surety bond before entering upon the discharge of their duties, that such would be a valid rule that said Director and Secretary would have to comply with.

However, if the Board requires a surety bond, such could not be paid out of the appropriations made to the "State Board of Health--Cosmethology and Hairdressing," Subdivision Section 24, Laws of Missouri, 1935, page 98, in our opinion, for the reason that said appropriation act does not provide for the payment of bonds from said appropriation.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

BOARD OF HEALTH: State Board of Education proper State agency to receive Federal Funds for purpose of carrying out provisions of Article 1, Chapter 52, R. S. Mo. 1929.

2-29

February 29, 1936.

FILED
59

E. T. McGaugh, M. D.
Health Commissioner
Missouri State Board of Health
Jefferson City, Missouri

Dear Sir:

It is our understanding that you desire an opinion as to the proper State agency to receive the Federal Funds for the purpose of carrying out the provisions of Article 1, Chapter 52, R. S. Mo. 1929.

Section 643, Laws of Missouri, 1933, page 252, provides:

> "Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the State Board of Education, as constituted by law, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said Board, so that the right and title to shall pass to and vest in this State; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct. The intention of this act is to abolish

> the commission heretofore created to accept devises, bequests, donations, gifts or assignments of money, bonds or choses in action, or of any property, real, personal or mixed, and to transfer such duties to the state board of education."

By reason of this section we are of the opinion that the State Board of Education is constituted by law as the duly authorized State agency for receiving these funds.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General

JWH:EG



W

AUTOMOBILES: The owner of the car is liable for damages to a hitch-hiker provided the hitch-hiker is not guilty of contributory negligence. The owner of a car owes a hitch-hiker the same degree of care as any other person, that is, the highest degree of care.

March 12, 1936.

316

FILED
59

Honorable Harry McGee
Warrenton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of February 24, 1936, as follows:

> "Will you please give me an opinion on the following situation? If a person picks up a hitch-hiker and later has an accident and injures this hitch-hiker can the hitch-hiker hold the driver of the car liable for any damages?
>
> "Thanking you for this information, and with kindest personal regards, I am."

Section 7775, Revised Statutes Missouri, 1929, in part, provides:

> "Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person * * * *."

The above statutory provision requires that the degree of care to be exercised in driving an automobile is the highest degree of care. In this State the law requires the operator of a vehicle on the highways to exercise the highest degree of care so as to not endanger the life or limb of any person.

By virtue of this statutory provision regardless whether the occupant be an invited guest or uninvited guest riding with the consent of the operator, or a licensee, or invitee and is not a trespasser, the same degree of care is required in each and every instance. This is further supported by the following decisions rendered by the Supreme Court of this state in Junior Wilson, by next friend Foster Wilson v. Thompson 72 S. W. (2d) 1001, 335 Mo. 375.

The court held in the above case that in an accident for damages an instruction which authorized a verdict for defendant, if the jury should believe that he was in the exercise of due care in driving his automobile, was erroneous. Due care is ordinary care and the driver of an automobile was required to exercise the highest degree of care.

Likewise, in Kaley v. Hantley 63 S.W. (2d) 21, l. c. 26, the court said:

> "Our attention is directed to the case of Alley v. Wall (Mo. App.) 272 S.W. 999, 1002, as holding, as we find that it does hold, that the care due from a host to a guest is reasonable care. If by reasonable care was meant ordinary care - and those terms are sometimes, though inaccurately if by way of definition, used interchangeably, but neither of which is a sufficient designation of the highest degree of care - that holding is disapproved."

In the above case the court further said:

> "We regard the following general statement of duty of a guest as laid down in Berry on the Law of Automobiles (6th Ed.) Volume 1, Section 665, as correct and as applicable to the duty of the plaintiff in the situation in which she was placed: 'When dangers, which are either reasonably manifest or known to an invited guest, confront the driver of a

> vehicle, and the guest has an adequate and proper opportunity to conduct or influence the situation for safety, if he sits by without warning or protest and permits himself to be driven carelessly to his injury, this is negligence which will bar recovery."

The following is required for contributory negligence to defeat recovery: (269 S.W. 690) Chapman v. Mo. Pac. Ry.).

> "In order for plaintiff's contributory negligence to defeat recovery, such negligence must have formed the direct producing and efficient cause of the collision would not have happened. Conrad v. Hamra (Mo. App.) 253 S. W. Loc. cit. 811, and cases there cited. We are of the opinion that plaintiff's negligence, under the facts at bar, was a question for the jury."

Haddy Ency. of Automobile Law, page 217, Vol. 5-6. The general rule of law is:

> "When the occupant of an automobile, other than a trespasser, is injured through the operation of the machine and the driver was negligent and the occupant was not guilty of contributory negligence, the latter may, as a rule, maintain an action against the driver and recover compensation for his injuries, <u>provided, of course, that the driver was guilty of negligence</u> which was the approximate cause of the accident."

The above decision and rule of law merely defines contributory negligence as laid down by the courts of this state. If such occupant of the automobile be guilty of same he is barred from recovery in case of accident.

In Wurtzburger v. Oglesby 222 Ala. 151, 131 So. 9, the Court refused to accept the distinction between a guest specifically invited by the owner to ride and guests who had at least invited negotiations leading up to the invitation.

In Robinson v. Leonard 100 Vt. 1, 134 Atl. 706, the court said:

> " A person riding with the knowledge and consent of the driver or owner is no less a guest because he asked for the privilege of doing so. The same obligation of care is imposed upon the driver as in the case of one expressly invited by the latter."
>
> "Our courts, however, have never adopted the doctrine that an automobile is such a dangerous instrumentality as to render the operator or owner thereof liable for an injury resulting from its operation, in the absence of negligence in the operation."

Hall v.Compton 130 Mo. App. 675, 108 S. W. 1122 and State v. Miller (Mo. Sup) 234 S.W. 813.

CONCLUSION.

In view of the decisions hereinabove cited, it is the opinion of this department that when a hitch-hiker is permitted to ride with the owner of an automobile, he becomes an invited guest, and the owner of the automobile becomes liable under the following conditions: When dangers which are reasonably known to the guest confront the owner of the automobile and the guest has an adequate or proper opportunity to inform said owner as to the proper conduct for safety, if said guest sits idly by without warning or protest and permits the owner of the car to drive carelessly to the injury of the invited guest, then the invited guest is guilty of contributory negligence, and the owner of the automobile is not liable.

The fact that the hitch-hiker requests the privilege of riding and is not invited in the first instance, by the owner of the automobile to ride, does not in any wise reduce or change the obligation of the owner of the car to the hitch-hiker. Thus, in the absence of contributory negligence on the part of the hitch-hiker, the owner of the car owes to said hitch-hiker the exercise of the highest degree of care, and if the automobile owner is guilty of negligence, he becomes liable.

Respectfully submitted

OLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

OWN:ARH:H

CHIROPRACTORS: May certify to death certificates

HB #65

3-17

FILED
59

March 16, 1936

E. T. McGaugh, M. D.
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Dr. McGaugh:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "I hereby request that you render us an opinion as to whether or not a chiropractor can legally sign a medical certificate of death. Especially would we like to have your interpretation of Section 6, page 135, Session Laws of Missouri 1927.
>
> "Chiropractors, of course, are not examined or licensed by the State Board of Health. Neither does the chiropractor have the right to prescribe.
>
> "In view of the fact that the death certificate contains a medical certificate of death we feel that the chiropractor cannot legally sign a death certificate."

Section 9046, Revised Statutes Missouri 1929, provides, in part:

> "* * * The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased,

> who shall specify the time in attendance, the time he last saw the deceased alive and the hour of the day at which the death occurred. And he shall further state the cause of death, so as to show the course of disease or sequence of causes resulting in the death, giving the primary cause, and also contributory causes, if any, and the duration of each. Indefinite and unsatisfactory terms, indicating only symptoms of disease or conditions resulting from disease, will not be held sufficient for issuing a burial or removal permit; and any certificate containing only such terms as defined by the state registrar shall be returned to the physician for correction and definition. Causes of death, which may be the result of either disease or violence, shall be carefully defined; and, if from violence, its nature shall be stated, and whether (probably) accidental, suicidal or homicidal. And in case of deaths in hospitals, institutions, or away from home, the physician shall furnish the information required under this head (item 19), and shall state where, in his opinion, the disease was contracted."

The above section provides that the medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased. Section 9047, Revised Statutes Missouri 1929, provides that in case of any death occurring without medical attendance it shall be the duty of the undertaker to notify the registrar of such death, and when so notified the registrar shall inform the local health officer and refer the case to him for immediate investigation and certification, prior to issuing the permit. The section further provides that when the local health officer is not a

qualified physician, or when there is no such official, in such cases only, the registrar is authorized to make the certificate. It is provided further that if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification.

From the above it is plain that a death certificate is not always required to be signed by a physician, for instance, when there is no physician in attendance at the time of death, and, when there is no local health official who was a qualified physician, the registrar is authorized to make this certificate. If the registrar refer the case to the coroner for his investigation the coroner makes the certification. The local registrar or coroner need not be, and, in many cases, would not be, a licensed physician.

Section 13551, Revised Statutes Missouri 1929, reads as follows:

> "Chiropractic practitioners shall be subject to the state and municipal regulations relating to the control of contagions diseases, the reporting and certifying of deaths, and all matters pertaining to public health, and such reports shall be accepted by the officer or department to whom such report is made."

The above section was first enacted March 14, 1927. Section 9046, supra, was enacted in 1909. The Legislature, when they enacted Section 13551, must have had in mind the provisions of Section 9046.

In the case of State v. Brown 68 S. W. (2d), page 59, the Court said:

> "It will be observed that section 4556, except the last proviso which is not pertinent to the matter here in controversy, relates to corporations in general, while section 5613 relates only to a particular class of corporations, to wit, building and

> loan associations. In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Tevis, et al. v. Foley, 325 Mo. 1050,1054, 30 S. W. (2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S. W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S.W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556,must yield to the special statute, section 5613."

In view of the above, it is the opinion of this department that Section 13551, which relates specifically to chiropractors, constitutes an exception to Section 9046, it having been enacted at a later date prevails as to chiropractors and gives them the right to report and certify to deaths and requires their report and certification to be accepted by the registrar.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

COUNTY BUDGET ACT: It is the duty of county court in counties of 50,000 population or more to adopt the budget 10 days before January 1 of each year unless terms of any of judges expire, in which event appropriation and and final order shall be made on or before February 1.

4-20

April 17, 1936.

FILED
59

Honorable John H. McNatt,
Assistant Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of April 10 wherein you request an opinion regarding the following question:

> "Will you kindly advise if the County Court of St. Louis County has until the end of the February Term to complete the budget under the new Budget Law?"

In the County Budget Act (Laws of Mo. 1933, p. 346), Sections 9 to 20 inclusive, these being the sections governing counties of the population of St. Louis County, we do not find any direct reference as to the time the budget is to be completed and filed. However, we note in Section 14 of the Act, page 349, the following:

> "Except as hereinafter provided, the budget shall be adopted and the appropriation order finally made at least ten days before the beginning of the fiscal year.
>
> * * *
>
> "In any year in which the terms of any of the judges of the county court expire, the budget shall be approved and the appropriation order made by the new court within thirty days after the beginning of the fiscal year."

Section 11, page 347, makes it the duty of the departments to submit to the budget officer the estimates of their respective offices on or before October 1 of each year. It is the duty of the budget officer, under the same section, to transmit the budget document fully prepared to the county court not later than November 15.

Bearing in mind that the statutes state it shall be adopted ten days before the end of the fiscal year unless the terms of any of the judges of the county court expire, we must determine what is meant by the term "fiscal year".

In the case of State ex rel. v. Appleby, 136 Mo. 408, the Court held that the county fiscal year begins on the 1st day of January and ends on the 31st day of December of each year.

Speaking on the same question in the case of Union Savings Bank v. Sedalia, 300 Mo. l.c. 412, the Court said:

> "The constitutional provision, supra, covers both counties and cities. If the word 'year' as therein used means a calendar year as to counties, why should it mean a different thing as to cities? As to both it refers to and limits the debt-making power during the period of twelve months. The particular twelve months, we say, as to counties, is the twelve months beginning January 1st and ending December 31st. Not only so, but we have so said, where the matters at issue were the fiscal transactions of the counties. The fiscal year of the county by our ruling has been established as a calendar year. We can see no reason for a different rule as to cities, in that cities are placed in the same category in the constitutional provision. Our statute relative to the meaning of words (Sec. 7058, R.S. 1919) says: 'The construction of all statutes of this State shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature, or the context of the same statute: .....third, the word 'month' shall mean a calendar month, and the word 'year' shall mean a calendar year, unless otherwise expressed.' This statutory rule may have no application as to the word 'year' in the Constitution, because the statute (Section 7058, supra) is made applicable to statutes. It does have

application to Section 70 of the Act of 1893 (Laws 1893, p. 77) because the word 'year' is used therein. This is the original law by which cities of the third class were authorized to anticipate and use their annual revenue in advance of its actual collection, by the issuance of current revenue bonds. Under the rule made by Section 7058, supra, the word 'year' in the Act of 1893, would mean a calendar year, 'unless otherwise expressed' in the said Act of 1893. It is not specifically or 'otherwise expressed' unless it can be said that the qualifying word 'fiscal' amounts to an otherwise expression. We have given above the several definitions of the term 'fiscal year', and these definitions do not indicate that such a year should differ from the calendar year. Accounts can be balanced as well on December 31st as upon June 30th. So, too, settlements can be made as well upon the one date as the other. There is no real reason why the so-called 'fiscal year' should not correspond with the calendar year. It is at least safe to say that if we follow the rule given in Section 7058, supra, in the construction of Section 70 of the Act of 1893, we cannot say that it is therein so 'otherwise expressed', as to allow us to say that the year intended by the said Act of 1893, was other than a calendar year. The use of the word 'fiscal' does not suffice to change the situation."

CONCLUSION

In view of the terms of Sections 11 and 14 of the County Budget Act, it is the opinion of this department that it is the duty of the County Court in counties of the population of St. Louis County to adopt the budget and make the appropriation ten days before January 1 of each year, unless the terms of any of

the judges of the County Court expire, in which event the appropriation and final order shall be made on or before February 1.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

GAMBLING - Tit-Tat-Toe Gum Vending Machines are Gambling Devices

April 27, 1936

4-28

FILED
59

Mr. E. McQuerry
City Attorney
Mound City, Missouri

My Dear Sir:

We have your request of April 24, 1936 for an opinion relative to one Tit-Tat-Toe gum vending machine. Your request, in part, is as follows:

> "That is, is the keeping and operating of Tit-Tat-Toe gum vending machines a violation of said section. In case you are not familiar with these machines, they are operated by placing a penny in a slot and pushing down a short lever. The rebound of this lever will kick out a round piece of gum and at the same time whirl three rollers or discs which are covered with red crosses and circle, certain combinations of which will indicate that the player either will or will not get additional 'points', which said points run from ten to 100 and may be and is used to purchase additional gum or other goods -- usually candy or beer, cigarettes or cigars.
>
> "The point is, the player will always get a piece of gum that regularly sells for a penny. In your opinion is this 'Keeping Gaming Devices' as prohibited by above section?"

Section 4287, Revised Statutes Missouri 1929, defining certain criminal offenses, and particularly including the offense of setting up or keeping any table or gambling device, is broad enough to include the Tit-Tat-Toe machine outlined in your letter.

Section 4314, Revised Statutes Missouri 1929, makes it a criminal offense to set up or establish any lottery. The three essential elements of a lottery are; (1) prize, (2) consideration, and (3) chance. State v. Emmerson 1 S. W. (2d) 109. The lottery statute has been held to apply to 'suit' clubs. State v. Meyer Tailoring Company 25 S. W. (2d) 98, and, in other opinions of this office, we have held that it applied to 'bank night,' 'the rocket machine,' 'the sportsman machine,' 'ball machines,' 'whiffle boards' and 'weekly drawings,' all of which have the three essential elements of lottery, as outlined by you in the Tit-Tat-Toe gum vending machines.

It is, therefore, the opinion of this office that the Tit-Tat-Toe gum vending machine, as described in your letter, is a gambling device prohibited by Section 4287, and a lottery within the provisions of Section 4314, Revised Statutes Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:LC

PHYSICIANS AND SURGEONS: Certificate of dean of reputable medical school that an applicant has met the requirements of said school and will be issued a diploma is sufficient to permit an applicant to take the examination for a license to practice medicine.

May 19, 1936

5-20

FILED
59

E. T. McGaugh, M. D.
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Dr. McGaugh:

This will acknowledge receipt of your letter requesting an opinion from this Department, which reads as follows:

"I am writing to know whether or not the Board could legally accept medical students for the State Board examination who have not received their medical diplomas and who have not presented their medical diplomas for verification before the examination, but can furnish a statement from the Dean of the Medical School that they have met all the requirements of a reputable medical school and would be graduated and receive their diplomas in a few days. The Board feels sure that these boys will be graduated and receive their diplomas, and the Dean will furnish a statement to that effect. In other words, will it permissible to let these boys take the examination and verify their diplomas before issuing their license.

"The Statute reads that they shall furnish satisfactory evidence of having attended throughout at least four terms

> of thirty-two weeks of actual instruction in each term and of having received a diploma from some reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two years' experience in operative and hospital work at time of graduation.
>
> "Kindly let us hear from you at your very earliest convenience in regard to the matter, in order that we may have time to change the dates if it is necessary. The examination is scheduled for the 4, 5 and 6 of June."

Section 9113, Revised Statutes Missouri 1929, provides, in part:

> "All persons appearing for examination shall make application in writing to the secretary of the said board thirty days before the meeting. They shall furnish satisfactory evidence of their preliminary qualifications, to-wit, a certificate of graduation from an accredited high school, or its equivalent. They shall also furnish satisfactory evidence of having attended throughout at least four terms of thirty-two weeks of actual instruction in each term and of having received a diploma from some reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two years' experience

in operative and hospital work at time of graduation; * * * "

From the above section, we think it plain that a person appearing for examination for a license to practice medicine in this state must have received a diploma from some reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two years' experience in operative and hospital work at the time of graduation. The question to be determined is, whether a certificate of the dean of such a medical school that a person desiring to take the examination has met all the requirements for graduation and will receive a diploma in a few days, is equivalent to a diploma within the meaning of Section 9113, supra, and will permit such an applicant to take the examination for a license to practice medicine within this state.

A similar question was passed on in the case of Levin v. Board of Medical Examiners of California 239 Pac. 410. The Court, at l. c. pages 411, 412, said:

> "The sole question here presented, therefore, is whether or not petitioner in legal contemplation was possessed of a diploma from the medical college mentioned at the time he was permitted to take his examinations before the board of medical examiners of the state of Michigan.
>
> "If the act of such board permitting him to take the examinations before his diploma could be actually made out and issued to him constituted the maintaining of a standard not equal to this state, then petitioner is not entitled to the relief sought. If, on the other hand, the possession by him of the certificate and the subsequent issuance to him of his diploma was to all legal intents and purposes the possession

by him of a diploma, then it is conceded petitioner is entitled to a license on reciprocity, and it should be issued to him. To state the question is to answer it. The certificate was to all intents and purposes the equivalent of a diploma. It certified that petitioner had passed his final examinations, and he was therefore entitled as a matter of right to a diploma. Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N. W. 294, 17 L. R. A. (N.S.) 930. Moreover, the diploma was in fact issued to him before he was granted his license. To say that under such circumstances he was not possessed of a diploma entitling him to take his examinations would be to put a narrow construction upon our statute, which requires the filing of a diploma prior to the taking of examinations. The statute should receive a reasonable construction, and the spirit and reason should prevail over the letter."

CONCLUSION

In view of the above, it is the opinion of this Department that a certificate from a dean of a reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two years' experience in operative and hospital work at time of graduation, that an applicant to take the examination for a license to practice medicine within this state has completed all the requirements of such school and will be graduated and receive his diploma in a short time, is sufficient to permit such an applicant to take the examination for a license to practice medicine within this state, and is

a substantial compliance with the statute which requires an applicant at the time of taking the examination to have a diploma from a reputable medical school.

It is our further opinion, however, that such an applicant should not be issued a license by the State Board of Health to practice medicine within this State until he has actually received his diploma and satisfactory evidence of such fact has been furnished the State Board of Health.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

HOTELS--TOURIST CAMPS: Tourist Camps with ten or more guest rooms are to be inspected and licensed as hotels.

Probably superseded now - new stat. provides for licensing tourist camps. See 0-25 (Adam-49)

June 9, 1936.

6-9

FILED 59

E. T. McGaugh, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Doctor McGaugh:

We acknowledge your request for an opinion dated June 2, 1936, which reads as follows:

> "Would the owner of a Tourist Camp consisting of ten or more cabins which were rented as places of lodging, be required to pay a Hotel License Fee?"

Article VII, Chapter 93, R. S. Mo. 1929, deals with health, safety and sanitary requirements of hotels, inns and boarding houses, operating in the State of Missouri, and is a health measure enacted within the police powers of the Legislature. Section 13084 R. S. Mo. 1929 of said chapter makes it the duty of the Food and Drug Commissioner to inspect hotels annually. Section 13091 R. S. Mo. 1929 defines certain buildings or structures to be hotels within the meaning of Article VII, Chapter 93, R. S. Mo. 1929, and reads:

> "That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accomodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accommodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above

> described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner."

Section 13094 R. S. Mo. 1929, provides how guest rooms are to be enumerated on inspection and reads:

> "In all hotels within the meaning of this article the parlor, dining room, kitchen and office shall be construed to mean guest rooms."

Section 13093, R. S. Mo. 1929, provides for the issuance and revocation of hotel licenses in Missouri, and also the graduated fee for the license to operate a hotel in this State.

The whole query turns on the point as to whether a tourist camp operating in this State with ten or more guest cabins fall within the provisions of the Statutes, and the common law of Missouri, regulating the inspection of hotels, inns and boarding houses.

In the case of Metzler v. The Terminal Hotel Company 115 S. W. 1037; 135 Mo. App. 410, l. c. 415, Section 1039, supra, was construed. That Court held that a place where lodging is furnished to transient guests, as well as one where both lodging and food are furnished is a hotel within the meaning of Article VII, Chapter 93, R. S. Mo. 1929. The fact that accommodations were not contiguous did not change a hotel to be something else. The Court said:

> "Suffice to say as far as public policy is concerned, every sound reason for enforcing the full responsibility of innkeepers obtains with as much strength against the keepers of hotels who accept transient guests as lodgers only, as against those who entertain with both lodging and food. And if this responsibility ought to be remitted in some measure, the duty is legislative, not judicial. To all appearances defendant's establishment was

> a fully equipped inn or hotel where both lodging and meals could be procured by a guest. It took no measures to advise guests to the contrary and no doubt derived patronage from the fact that a restuarant was at hand and seemingly appurtenant. Persons stopping in the hotel would have the right to presume defendant was acting as an inkeeper. This ruling we think, is in accord with decisions which have dealt with the question. * * * It is commonly understood a place of transient resort like defendant's is a hotel or inn, and our statutes touching inns and innkeepers point to the like legislative opinion."

CONCLUSION.

To say that tourist camps are not hotels within the meaning of Section 13091, supra, would defeat the legislative intention in said section to protect the wayfaring public in their health and safety against those who entertain transients or permanent guests with sleeping accommodations for pay.

The Legislature realized that without Section 13091, supra, proprietors of tourist camps might reason that they do not keep an inn in the ancient sense of the word. By Section 13091, supra, the Legislature extended the extraordinary common law liability of the auxiliary statutory regulations of innkeepers to include proprietors of buildings and other structures, who in the main offer the same or similar public service to the wayfaring public as innkeepers offer.

The common law and statutory regulations affecting innkeepers was first established centuries ago because traveling was attended with great danger to the life, health, safety and property of the traveler in strange parts. Methods of traveling have changed today. Instead of wayside inns we have hotels and wayside tourist camps, but with the change of the traveler's public accommodations, the reason for the old law has not vanished. Public

policy in this day demands that the life, health, safety and property of the wayfaring traveler be reasonably safeguarded, hence, this inspection and regulation of hotels and inns by the Board of Health extends, in our opinion, to tourist camps of ten or more guest rooms. Such was the intention of the Legislature.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

FOOD AND DRUGS: Whether coloring added to "orange drinks" adulterates such is question of fact -- color added to "orange drinks" unless stated on container in which sold, is misbranded.

June 19, 1936. 6-27

FILED 59

Honorable E. T. McGaugh, M. D.
State Health Commissioner
State Board of Health
Jefferson City, Missouri

Dear Dr. McGaugh:

This is to acknowledge your letter as follows:

> "I am requesting an opinion as to the sale of orange drinks within the State as regards color, that is whether or not artificial coloring can be added to orange drinks."

At the outset of this opinion we desire to call your attention to the fact that we do not know what you mean by the term "orange drinks." We assume that it is a drink which is represented as being made solely from the juice of oranges and not the drink "orangeade" as commonly known. Thus, assuming the premise that orange drinks are composed solely from the juice of oranges, we proceed with your inquiry.

The regulating of food and drugs in the State of Missouri as to adulteration and misbranding is an exercise of the police power and solely an inspection law. Coca Cola Bottling Co. et al. v. Mosby, 233 S. W. 446; State v. Leif, 248 Mo. 722.

Article 2, Chapter 93, R. S. Mo. 1929, pertains to adulteration and misbranding of food and drugs. Section 13017, of said article and chapter defines "food" as follows:

> "The term 'food,' as used in this article, shall include all articles used for food,

drink, confectionery or c ndiment by man or animal, whether simple, mixed or compound."

Section 13019, R. S. Mo. 1929, provides when food is deemed to be adulterated, and in part provides as follows:

"Food shall be deemed to be adulterated: 1. If any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect its strength, quality or purity. * * * * * * 4. If it is mixed, colored, coated, polished, powdered or stained in a manner whereby damage or inferiority is concealed; or if, by any means, it is made to appear to be better or of greater value than it really is."

Section 13020, R. S. Mo. 1929, defines the term "misbranded."

Section 13022, R. S. Mo. 1929, provides when food is deemed to be misbranded and provides in part as follows:

"In the case of food as herein defined, an article shall also be deemed to be misbranded: 1. If it is an imitation of, or is offered for sale or sold under the distinctive name of another article.
2. If it be labeled or branded, tagged, stenciled or marked so as to deceive the purchaser, or purport to be a foreign product when not so.

* * * * * *

6. * * * Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed misbranded in the following cases, viz.: * * *(2) In the case of articles labeled, branded, stenciled, or tagged so as to plainly indicate that they are mixtures,

> compounds, imitations or blends, and the word 'mixture,' 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package or container in which they are offered for sale: Provided, that the term 'blend,' as used herein, shall be construed to be a mixture of like substances, not excluding harmless coloring and flavoring ingredients used for the purpose of coloring and flavoring only; * * * *"

Sections 13030, 13031, 13032 and 13033, R. S. Mo. 1929, relate to non-alcoholic drinks such as ginger ale, soda water, lemonade, orangeade etc. However, as we have assumed that orange drinks mean those drinks made solely from the juice of oranges and not a non-alcoholic drink as defined in the above Sections 13030-33, inclusive, we do not in this opinion quote from those sections as they do not relate to orange drinks.

From the above and foregoing it is our opinion that if coloring is added to orange drinks and such lowers or depreciates or injuriously affects its strength, quality or purity, or by adding the coloring damage or inferiority of the drink is concealed or it is a means by which said drink appears to be better or of greater value than it really is, then such would amount to an adulteration of the orange drink and would be violative of Section 13019, R. S. Mo. 1929. Whether or not coloring added to orange drinks makes said drinks adulterated would be a question of fact which your Department will have to determine. This Department does not know whether the coloring added to orange drinks would, in fact, affect its quality or purity or conceal its inferiority. However, if you determine as a fact, that coloring added to orange drinks does not adulterate such, yet said orange drinks must be plainly labeled or branded, tagged, stenciled or marked so as to not deceive the purchaser.

It is our further opinion that orange drinks that have artificial coloring added to same would be misbranded unless such fact was stated on the container or the package in which such are sold or offered for sale.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK,
Attorney-General

JLH:EG

STATE BOARD OF HEALTH: REGISTRATION OF BIRTHS AND DEATHS:

Local registrar cannot issue certified copies of birth and death certificates and charge therefor.

July 28, 1936

FILED
59

E. T. McGaugh, M. D.
State Health Commissioner
State Board of Health
Jefferson City,Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

> "Section 9060 Revised Statutes of Missouri for 1929 provides:
>
> "'The state registrar,shall upon request,furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. And any such copy of the record of a birth or death, when properly certified by the state registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. For any search of the files and records, when no certified copy is made, the state registrar shall be entitled to a fee of fifty cents for each hour or fractional hour of time of search, to be paid by the applicant. And the state registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the state treasurer.'

"The State Board of Health has promulgated the following regulation pertaining to the above section (page 10 of 'regulations and Instructions Governing the Registration of Births and Deaths and Disposal of Dead Bodies' 1935):

"'No local registrar has the legal right to issue a certified copy of a birth or death certificate,either free or for pay. The state registrar at the central office in Jefferson City has the sole right to issue certified copies of certificates of births or deaths.'

"I desire and will appreciate your opinion on the following questions:

"1. May a local registrar of the State Board of Health issue certified copies of birth or death certificates and make a charge therefor, or is this authority lodged solely in the state registrar?

"2. If a local registrar has such authority, must he account to the State Treasurer for fees received by him?"

It is clear, from a reading of Chapter 52, Article 2,Revised Statutes Missouri 1929,which relates to the registration of births and deaths, that the local registrars and sub-registrars are subordinate to and under the control and supervision of the state registrar of vital statistics.

Section 9058, Revised Statutes Missouri 1929, which specifies the duties of local registrars, requires, among other things, that the local registrar shall make a copy of each birth and death certificate registered by him in a record book of approved form, to be kept and permanently preserved in his office as a local record of such births and deaths and that he shall, on the 10th day

of each month, transmit to the state registrar all original certificates registered by him during the preceding month. Said section reads, in part, as follows:

> "* * * He shall also make a complete and accurate copy of each birth and death certificate registered by him in a record book of approved form, to be kept and permanently preserved in his office as the local record of such birth and death, in such manner as directed by the state registrar. And he shall, on the tenth day of each month, transmit to the state registrar all original certificates registered by him during the preceding month.* * *"

Neither the above section nor any other section makes it the duty of or authorizes the local registrar to furnish any person with a certified copy of the record of any birth or death. Furthermore, it would be impossible for the local registrar to give a certified copy of the original birth or death certificate after it has been transferred, as required by law, to the state registrar. All he could do would be to furnish a certified copy of the copy which he is required to make and keep. The statutes do not authorize him to do this or make any charge for so doing. Such a certified copy of a copy would not be admissible as evidence.

22 Corpus Juris, section 948, page 826, reads, in part,

> "As a general rule a certified copy of an official copy or other transcript of a record is not admissible in evidence."

On the other hand, under the provisions of Section 9060, Revised Statutes Missouri 1929, quoted in your letter, it is specifically made the duty of the state registrar to furnish, upon request, any applicant a certified copy of the record of any birth or death registered under the provisions of Article 2 of Chapter 52 of the Revised Statutes of Missouri 1929, and such certified copy is prima facie evidence in all courts and places of the facts therein stated. For making and

certifying to such records the state registrar is entitled to a fee of fifty cents which is to be turned over to the State Treasurer.

CONCLUSION

In view of all the above, it is the opinion of this department that a local registrar does not have the authority to issue certified copies of birth and death certificates and make a charge therefor, and that the authority to issue and charge for certified copies of birth and death certificates is lodged solely in the state registrar.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

TAXATION: Redemption of delinquent property subsequent to the second tax sale.

9-9.

September 7, 1936

FILED
59

Hon. John H. McNatt,
Assistant Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Sir:

This department acknowledges your request for an opinion under date of August 26th, wherein you state as follows:

> "Our Collector would like to know whether or not the purchaser of property at a tax sale has any right to redeem after he has defaulted in the payment of taxes and there is a second sale. In other words, can the purchaser at the first tax sale come in subsequent to the second tax sale, pay up the taxes and redeem as against the second purchaser.
>
> "This situation has arisen here and we would appreciate an opinion from your office."

Laws of Missouri, 1935, Section 9956a, page 437, sets out the manner of redeeming property sold for taxes, as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate

> of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Laws of Missouri, 1935, Section 9957c, page 440, provides as follows:

> "Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate,

> such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser, and such subsequent purchaser shall at the time of obtaining his certificate redeem said first certificate of purchase outstanding by depositing with the county collector the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of purchase and draw interest at the rate specified in said first certificate but not to exceed ten percent per annum from the date of payment. Said holder of a certificate of purchase permitting a subsequent certificate to issue on the same property, shall, on notice from the county collector, surrender said certificate of purchase on payment to him of the redemption money paid by the subsequent purchaser."

It is specifically provided that the first purchaser shall forfeit his rights of priority to the subsequent purchaser, and we are therefore of the opinion that the purchaser at the first tax sale can not come in subsequent to the second tax sale, pay up the taxes, and redeem as against the second purchaser.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

COUNTIES - Contracts: County Court cannot contract for a rock crusher when part payment must be made from the revenue of future years. If payment is contemplated out of revenue of year in which contract is made, same may be done without violating County Budget Act if sufficient funds remain in Classes 5 and 6 even though same was not included in the estimate for the fiscal year.

9-12

September 11, 1936.

FILED
59

Mr. C.W. McKim,
County Clerk,
Worth County,
Grant City, Missouri.

Dear Sir:

This department is in receipt of your letter of recent date, making the following inquiry:

> "Can the Worth County Court buy a rock crusher at this time, paying part down and obligating the county court next year to pay the remainder?"

In this instance, the question to be determined is whether or not the county court can contract this year for a rock crusher, paying a stipulated amount down at the time of the purchase and obligating the county to pay the remainder next year. Your letter is supplemented by a letter from Mr. Wolter of the Karcher-Wolter Equipment Company to the effect that $500 is to be paid at this time and the balance of $1750 is to be paid February 15, 1937.

It is a general rule of law that a county court cannot obligate funds or the revenue of future years for past or present indebtedness. We think the decision in the case of Trask v. Livingston County, 210 Mo. 582 prohibits your county from contracting for the rock crusher at the present time wherein it obligates itself to pay $500 at the time of purchase, the balance to be paid in the year 1937 out of the 1937 revenue.

A more recent case in which all the prior authorities are reviewed and in which the determining factor is whether or not the contract is executory and contingent is that of Ebert v. Jackson County, 70 S.W. (2d) 918, wherein the court passes on the question of a county binding itself to pay rent in future years. In that case the Court said (l.c. 920):

> "In the instant case the contract was not executory and contingent. It purports to bind the county to pay plaintiff $4,320 for the use of the room for four years, beginning August 1, 1925, payable $90 on the first day of each month, in advance. These payments were to be paid from the income and revenue of future years as well as from the income and revenue provided for the year the contract became effective. It was an unconditional promise made by the county on July 18, 1925, to pay the rent in advance on the first day of each month for four years. The payment of the rent was not contingent upon the occupancy of the room by the justice or on plaintiff's furnishing it to the county for that purpose."

In the case which you present, we do not think there is any contingency in the contract.. It is a definite sum for a definite purpose - the county obligates itself to pay a certain amount for a rock crusher. Therefore, we are of the opinion that if you contemplate paying the balance due and owing for the rock crusher out of 1937 revenue, the same is illegal and void.

Looking at the question from the standpoint of the contract being made in the year 1936 to be paid out of the revenue of 1936, we are confronted with the question of whether or not the debt created under the contract exceeds the anticipated revenue of 1936. The fact that the county would not have the funds or collect all of its anticipated revenue, would not void the contract. We refer you to the case of Watson v. Kerr, 312 Mo. 549, wherein the court said:

> "If, at the time of the creation, indebtedness is within the income reasonably anticipated, it is valid."

Likewise, in the case of Kirtley v. Schell, 36 S.W. 206, 135 Mo. 31:

> "A county warrant, duly issued

> for the legitimate expenses of the county, and which, together with prior warrants issued for the same purpose during the same year, does not exceed in amount the revenue provided for that year, is valid, though a sufficient amount may not be collected from such levy to pay all warrants so issued."

Class 3 of the Act (Laws of Mo. 1933, p. 341) makes no reference to road equipment, referring solely to the repair and upkeep of bridges--in fact, none of the classes make reference to road funds unless, perhaps the same could be included under Class 5 - contingent, incidental and emergency expenses. If there are sufficient funds without jeopardizing the estimates under Class 5, we think the initial payment on the rock crusher could be made from the funds in that class.

The Legislature, in enacting the County Budget Act and dividing the revenue of the county into five classes, has not used specific and definite terms with reference to road and bridge funds and has made no mention by direct reference to the special road and bridge fund, for which every county in the State exacts various rates of taxation. Section 1 of the Budget Act states:

> " * * * Whenever the term revenue is used in this act it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this act regardless of the source from which derived."

This department has never ruled on the question of road and bridge funds being subject to the Budget Act but has ruled that the Special Road and Bridge Fund is not subject to the Act. An opinion to that effect was rendered on January 21, 1936 to the Honorable O.A. Kamp, Prosecuting Attorney of Montgomery County, copy of which is hereto attached. Of course, if your county has any funds in Class 6 and the conditions of Class 6 can be met, the surplus could be used for the initial payment on the rock crusher irrespective of whether or not road and bridge funds are subject to the Act. However, we are of the opinion that the funds derived from the road and bridge tax are subject to the terms of the Budget Act.

CONCLUSION

In the last analysis, the question resolves itself into whether or not your county can spend the sum necessary for the purchase of the rock crusher without jeopardizing the priorities of the classes. If the money for the initial payment is taken from the Special Road and Bridge Fund, then, of course, the budget does not have to be taken into consideration. If the county court can make the payment from Class 5 without jeopardizing the other estimated and contemplated items under that class, it is the opinion of this department that it is legal and proper to do so.

If your county is in dire need of the rock crusher, the same could be considered an emergency item. Not having before us the financial condition of your county with regard to the budget, we cannot pass on the question further than to say that if the financial condition of your county will permit, subject to the conclusions we have offered above, the rock crusher may be purchased.

The above conclusion, however, is based on the assumption that the entire purchase price of the rock crusher will be paid out of 1936 revenue. If the balance of the purchase price, i.e., $1750 is to be paid from the revenue of 1937, it is our opinion that the contract is void and illegal for the reasons heretofore stated in this opinion.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

REQUEST NO. 518

FEES:
FUNDS: Fees received by Commissioner of Health from Federal Government for transcripts relating to births and deaths must be turned into the State treasury.

November 6,1936.

FILED
59

Dr. E. T. McGaugh
Commissioner of Health
Capitol Building
Jefferson City,Missouri

Dear Dr. McGaugh:

We are in receipt of a communication from the Department of Commerce, Bureau of Census, Washington, D. C., stating that on May 1, 1933, you were appointed Special Agent of the Bureau of Census and took an oath of office; that on May 24, 1933, you were authorized by the Director of the Bureau of Census to furnish transcripts of "(1) certificates of births (exclusive of still births), (2) certificates of deaths (exclusive of still births, and (3) certificates of still births (reported as births), with payment at the rate of three cents for each transcript.

You received from the Bureau of Census for said transcripts so furnished to them, the following amounts:

(1)	1933----------	$1,116.60
(2)	1934----------	2,604.54
(3)	1935----------	3,086.07
(4)	1936----------	1,349.19
	Total	$8,156.40

You have thus received from the Bureau of Census $8,156.40 for transcripts furnished to them, and, at the rate of three cents per transcript, it means that you have furnished to the Bureau of Census 271,880 transcripts.

Article 2, Chapter 52, R. S. Mo. 1929, and amendments, relate to "Registration of Births and Deaths" in the State of Missouri, and Section 9049, R. S. Mo. 1929, provides in part as follows:

> "It shall be the duty of the state board of health to have charge of the state system of registration of births and deaths; * * * * and to insure the faithful registration of the same in the registration districts and in the central bureau of vital statistics at the capital of the state. * * * * * *."

By virtue of the provisions of Section 9049, supra, a Central Bureau of Vital Statistics was established. The Central Bureau of Vital Statistics is located in Jefferson City, Missouri, and by virtue of Section 9041, R. S. Mo. 1929, and Section 9024, Laws of Missouri, 1933, page 269, you, as Commissioner of Health, have supervision over the Central Bureau of Vital Statistics. Section 9041 provides in part as follows:

> "The secretary of the state board of health (Commissioner of Health) shall have supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board, and shall act as state registrar of vital statistics. * * * * The state board of health shall provide for such clerical and other assistance as may be necessary for the purpose of this article, who shall serve during the pleasure of the board, and may fix the compensation of persons thus employed within the amount appropriated therefor by the legislature. Suitable apartments shall be provided by the custodian of the capitol for the bureau of vital statistics and the state board of health in the state capitol at Jefferson City, which shall be properly equipped with

> fireproof vault and filing cases for the permanent and safe preservation of all official records made and returned under this article."

Thus, the Legislature has provided for clerical and other assistance necessary to register and record vital statistics of the State of Missouri.

The State Legislature appropriated to the Department of Health the sum of $165,000.00 for "personal service" which is to pay for all services necessary for vital statistics. Laws of Missouri, 1935, pages 96-97. We thus have in Jefferson City a Central Bureau of Vital Statistics and provision made for the employment and compensation of clerical and other assistance and the payment for the administration of the provisions of the statutes relating to registration of births and deaths.

Provision was also made for the furnishing of certified copies of the record of any birth or death and the collection of a fee, which fee must be turned over to the State Treasurer, as Section 9060, R. S. Mo. 1929, provides in part as follows:

> "The state registrar (Commissioner of Health) shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. * * * And the state registrar shall keep a true and correct account of all fees by him received under these provisions, and turn the same over to the state treasurer."

While the Bureau of Census advises that you took an oath of office and were appointed special agent, yet, in view of Section 4, Article XIV, of the Constitution of the State of Missouri, which provides:

> "No person holding an office of profit under the United States shall, during

> his continuance in such office, hold any office of profit under this state."

we assume that you furnished transcripts to the Federal Government in your official capacity as State Registrar and Commissioner of Health. We further assume that you did not individually furnish 271,880 transcripts or have some private employee furnish them, but that the actual work was done by state employees who were paid from state revenue.

While Section 9060, supra, provides that the State Registrar must, upon request, furnish an applicant a certified copy of the record of any birth or death and charge a fee of fifty cents and place said fee in the State Treasury, yet, in view of Section 101, Title 13, page 37, United States Code Annotated, we assume (1) that the data and necessary details furnished the Bureau of Census did not entail a certification as contemplated by Section 9060, supra, and (2) that it was with the view of cooperating with the Federal Government at a minimum cost to them in the collection of vital statistics. Section 101, supra, provides in part as follows:

> "There shall be a collection of the statistics of the births and deaths in registration areas annually, the data for which shall be obtained only from and restricted to such registration records of such States and municipalities as in the discretion of the director possess records affording satisfactory data in necessary detail, the compensation for the transcription of which shall not exceed 4 cents for each birth or death reported; * * * * *."

If you, as State Registrar, furnished to yourself, as an individual, the necessary information and then in turn gave that to the Bureau of Census the question presents itself as to whether or not you owe the State of Missouri fifty cents for each of the 271,880 transcripts. We, therefore, are warranted in assuming that you, as Commissioner of Health and State Registrar, cooperating with the Federal Government, exacted a fee of three cents per transcript, and hence you, as a State official, have received from the Bureau of Census the sum of $8,156.40.

It is well settled in this state that officials who receive fees must account for same and turn them to the State Treasury. The Legislature, in 1933, left no doubt on this subject because it enacted Section 1, Laws of Missouri, 1933, page 415, which in part reads as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. * * * * * *."

Conclusion.

From the above, we conclude and it is our opinion that the fees received from the Bureau of Census, in the amount of $8,156.40, should be turned into the State Treasury.

Yours very truly,

J. E. TAYLOR
Assistant Attorney-General.

JAMES L. HORNBOSTEL,
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET-JLH:EG

BOARD OF HEALTH: Legislature appropriated money for Trachoma Hospital at Rolla for salaries of employes for "Prevention of Blindness"; appropriation act unless supported by a statute is a nullity.

November 27, 1936.

FILED
59

Honorable E. T. McGaugh, M. D.,
State Health Commissioner,
State Board of Health,
Jefferson City, Missouri.

Dear Dr. McGaugh:

This is to acknowledge your letter as follows:

"Dr. Smith of the Trachoma Hospital at Rolla has submitted, the Hospital payroll for the month of November, to this office.

"I would like your opinion as to whether or not these salaries can be legally paid out of State Funds. The payroll is as follows:

"Margaret Orten, Head Nurse	$150.82
Dr. A. A. Drake, Relief Physician	15.00
Clara Standley, Field Nurse	104.17
Sam Winfrey, Cook, (partial payroll)	69.17"

To a final determination of the question presented two premises will have to be answered in the affirmative, namely, first, was there an appropriation made by the Legislature to pay salaries for employes of the Trachoma Hospital, and, second, if an appropriation, are the persons to whom the money is to be paid State employes? We do not know whether the persons listed in your letter are State employes or otherwise, consequently, we will write this opinion on the assumption that such persons are State

employes. If such are not State employes, then, of course, they would not be entitled to moneys from the State Treasury, if appropriated.

Article X, Section 19, of the Constitution of Missouri, in no uncertain terms provides:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * * *"

Referring to Laws of Missouri, 1935, page 96, we find the following:

> "There is hereby appropriated out of the state treasury, chargeable to the State revenue fund, the sum of Two Hundred Seven Thousand dollars ($207,000.00) to be expended for the following purposes, in the amounts hereinafter stated:
>
> "A. Personal Service:
>
> * * * * *
>
> "Prevention of Blindness:
> Surgeon in charge of trachoma hospital,
> hospital nurses, cook, maid,
> clinician, janitor.
>
> * * * * *
>
> . . . . . $165,000.00 "

The Legislature did appropriate moneys from the State revenue fund for personal services for hospital nurses and a cook. However, the appropriation of moneys By the Legislature for certain purposes without creating the employment therefor acts as a nullity. In other words, the Legislature could not, in view of Section 46 of Article IV of the Constitution, make

any grant of public moneys to any individual. Said Section 46 reads as follows:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Section 43, Article IV, Constitution of Missouri, also provides in part as follows:

> "* * * All appropriations of money by the successive General Assemblies shall be made in the following order:
>
> * * * * *
>
> "Fifth, For the payment of the civil list. * * * * * "

Thus, in order to pay out moneys by virtue of the appropriation act, supra, said surgeon in charge of the Trachoma Hospital, hospital nurses, cook etc., must be State employes and hold their employment by virtue of a statute. An appropriation act cannot legislate and unless there is an office or employment created independent of the appropriation act, said appropriation act would be unconstitutional and violative of Section 46, Article IV of the Constitution.

The Supreme Court of Missouri, en banc, in the case of Kavanaugh v. Gordon, 244 Mo. 695, specifically pointed out that an appropriation to an individual, when no office was created by that or any other act, amounted to a gift to an individual and hence was void and violative of Section 46, Article IV. The court said (p. 721):

> "Who hired him as an agent, on what terms and under what law? Some of the language indicates he was made independent of the commission. For instance, he reported to no one, he submitted his

> own vouchers to the Auditor and to that extent, at least, was given a free rein. As to that, whatever his object, it is clear the lawmaker was careful not to make him an officer with the indicia of office. As heretofore pointed out, he gave him no term, no official name, created no office, no tenure, no duties, did not assume to appoint him by saying so, and, under the law as written, he was entitled to his money without performing any duties whatever. Minus official orbit, he is a wandering star in Missouri governmental heavens. In that view of it, we can come to no conclusion except that he is dealt with as an individual. Hence the provision that $7000 of the $17,000 appropriated to the commission must be paid to him on his own vouchers, amounted in reason and law to an out-and-out gift to him as an individual of $7000 of the State's money in violation of Sec. 46, Art. 4, of the Constitution, supra. (State ex rel. v. St. Louis, 216 Mo. 47; State v. Distilling Co., 237 Mo. l. c. 106-7.) The appropriation fell squarely within the evils struck down by that constitutional interdiction, whereby the people set impassable bounds to legislative power. We have no call by construction to abate the vigor of that wise provision a whit."

When the Legislature by appropriation in 1935 permitted the expenditures of funds for personal service for "prevention of blindness" no doubt it assumed that there was a division created by the State Board of Health, and if such is the fact those people employed in that division would be entitled to compensation.

Section 9015, R. S. Mo. 1929, provides in part as follows:

> "It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages, and towns.

> It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. * * * * *"

Section 9017, R. S. Mo. 1929, reads as follows:

> "In addition to the divisions of vital statistics and laboratories already established, the board shall establish the following divisions: Preventable diseases, including tuberculosis, child hygiene, venereal diseases; and other divisions as it may deem necessary from time to time. The board shall formulate rules and regulations for the proper conduct of these divisions."

Section 9028, R. S. Mo. 1929, reads in part as follows:

> "All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities. * * * * *"

From a reading of the above three statutes it is seen that the State Board of Health has unlimited power to safeguard the health of the people of the State of Missouri. Authority is given to the Board to make rules and regulations and to create divisions in the State Health Department in order to properly safeguard the health of the public. The rules and regulations made by the State Board of Health are paramount.

As it is the duty of the State Board of Health to establish divisions in order to properly safeguard the health of the people of the State of Missouri and as said Board has the authority we assume that the State Board of Health established a division known as the "Prevention of Blindness." Consequently, if such be the fact, statutory authority may be pointed to in order to support the appropriation act.

From the above and foregoing it is our opinion that if said persons, to whom salaries are to be paid, are State employes engaged in work for the State Board of Health for the "Prevention of Blindness" (rendering service to the State), such would be legal and could be paid from the appropriation act appropriated by the Legislature. Section 22, Laws of Missouri, 1935, pages 96-97. While the appropriation act mentions hospital nurses and the payroll shows one head nurse and a field nurse, yet if both are connected with the hospital as hospital nurses, such could be paid. The payroll shows a "Dr. A. A. Drake, Relief Physician $15.00." We assume that the relief physician, as stated in the payroll, means a clinician. The cook is specifically authorized by the appropriation.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

Roy McKittrick

Attorney-General

JLH:EG

CORONER: Bond of Coroner should be filed in the Office of the County Clerk. Same can be recorded by the Recorder of Deeds.

12/4

December 4, 1936.

FILED
59

Honorable C.W. McKim,
County Clerk,
Worth County,
Grant City, Missouri.

Dear Sir:

This department is in receipt of your letter of November 28, wherein you make the following inquiry:

> "I made out an official bond for E.W. Girling, who was elected Coroner of Worth County at the last election. He obtained the proper securities and the Court approved same. Should this bond be filed and kept in this office? Also recorded here, or just what is the proper handling of the Coroner's bond? Where should it be recorded and who should keep same?"

The statutes relating to coroners and their manner of qualifying are Section 11609, R.S. Mo. 1929, which is as follows:

> "All coroners, before they enter upon the duties of their office, shall take the oath prescribed by the Constitution, and shall give bond to the State of Missouri, in the penalty of at least one thousand dollars, with sufficient sureties, residents of the county, conditioned for the faithful performance of the duties of their office."

And Section 11610, R.S. Mo. 1929, which provides:

> "The county court shall, once in every year, in each county, examine into the sufficiency of the official bond given by the coroner, and the sureties thereto; and if it shall appear that the bond of any coroner, or the sureties thereto, are insufficient, the said court shall cause a record thereof to be made by their clerk, and shall give notice thereof to said coroner, and require him to give a new bond, to the satisfaction of said court, within such time as they shall order."

And Section 11611, R.S. Mo. 1929, which is as follows:

> "If a coroner neglect to give bond and qualify within twenty days after his election, or shall fail to give bond when required under the preceding section, his office shall be deemed vacant."

The above quoted statutes place upon the County Court the duty of examining and determining the sufficiency of a Coroner's bond. It does not make provision for the office in which the bond is to be filed, but it is reasonable to assume--in fact, no other interpretation could be placed on the statute--that the bond, after being approved and from time to time examined by the County Court, should be filed in the office of the County Clerk.

The statute relating to coroners does not provide for recording the bond, nor is there any general statute which would compel the recording of the same; however, if the Court deem it necessary, the bond can be recorded in the office of the Circuit Clerk or Recorder of Deeds, as other instruments are recorded. We think, however, that it should be filed in the office of the County Clerk.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:AH

SOCIAL SECURITY: Federal Act in relation to the Missouri Blind Pension Law.

12-29

December 23, 1936

59
037 1

Hon. Allen McReynolds,
Chairman of the Committee
on Social Security,
Jefferson City, Missouri.

Dear Sir:

We have received your request of recent date wherein you requested an opinion on the provisions of the Social Security Act and its relation to the constitutional and statutory law of Missouri.

In this opinion, we will restrict ourselves to a review of the Title X of the act which deals with grants to states ~~cities~~ for aid to the blind. This title under Section 1002 sets forth the requirements which the State plan must meet in order that the State may receive the federal grants. These requirements are as follows:

> "(a) A State plan for aid to the blind must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting to any individual, whose claim for aid is denied, an opportunity for a fair hearing before such State agency; (5) provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be necessary for the efficient operation of the plan; (6) provide that the State agency will make such reports, in such form and containing such informa-

tion, as the Board may from time to time require, and comply with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports; and (7) provide that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old age assistance under the State plan approved under section 2 of this Act.

"(b) The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes, as a condition of eligibility for aid to the blind under the plan--

"(1) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid and has resided therein continuously for one year immediately preceding the application; or

"(2) Any citizenship requirement which excludes any citizen of the United States."

At the outset we wish to make it clear that this opinion does not in any way deal with the sociological aspect or the efficacy of the State plan, but only deals with the statutes as they are now and whether they will meet the requirements as set forth in the federal law. We are taking the federal requirements up in the order in which they appear in the Act.

I.

The Missouri Act sets forth the definition of "need" and the "blind". It is for the Federal Board to decide if these meet the federal requirements.

It is stated in Section 1001, Title X of the Social Security Act, which reads in part as follows:

"For the purpose of enabling each State to furnish financial assistance, as far

> as practicable under the conditions in such state, to needy individuals who are blind, * * *."

It is the rule followed by the federal courts that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein. As it was said in the case of Ozawa v. United States, 43 Sup. Ct. 65, 67 L. Ed. 199,

> "It is the duty of this court to give effect to the intent of Congress."

The intent of Congress, as stated above, is to help needy individuals who are blind.

It is for the State Legislature to say what constitutes "need" and this is then passed upon by the Federal Board.

Section 8893, R. S. Mo. 1929, states:

> " * * * that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatever, or who owns property, or has an interest in property to the value of five thousand ($5000.00) dollars or more, or who lives with a sighted husband or wife who has an income or is the recipient of six hundred ($600.00) dollars or more per annum from any source whatever or has property or an interest in property to the value of five thousand ($5,000.00) dollars or more, or who has a parent or parents, resident in this state who upon the investigation of the commission may be found to be able to provide for the reasonable support of such applicant; * * *."

This is an expression on the part of the Legislature as to whom they deem "needy persons", that is, those who do not have incomes or are not the recipients of the amount stated in the statutes as above set forth. Whether such a definition of "needy" will be accepted by the federal board, this office is not in position to state, but it seems very probable that such a standard will be upheld.

The same is true of the statutory definition of what constitutes blindness which is laid down in Section 8894, R. S. Mo. 1929, as follows:

> "No person shall be entitled to a pension under this article who has vision with or without proper adjusted glasses greater than what is known as light perception; that light perception as used in this section means not more vision than is sufficient only to distinguish light from darkness and recognize the motion (not the form) of the hand of the examiner at a distance not greater than one foot from the eye; and no person shall be entitled to receive a pension except upon scientific vision test supported by the certificate of a competent oculist, approved by the commission, that such person does not possess a greater vision than that provided above in this section; and every person passing the vision test and having the other qualifications provided in this article shall be entitled to receive a pension of three hundred ($300.00) dollars per annum, payable quarterly."

Whether the federal board will accept this "light perception" test, we can not say.

II.

The Missouri law agrees with the first requirement in that it is in effect in all political subdivisions of the State - It is not administered by these subdivisions.

Section 1002, Federal Social Security Act, supra, reads under subsection (a), point (1), as follows:

> " * * * It (the State plan) shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; * * *."

Section 8893, R. S. Mo. 1929, sets forth those who are eligible for blind pension and reads in part as follows:

> "Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provision of this article, * * *."

"Political subdivision" is defined in 49 Corpus Juris at page 1077, as "a term implying a division of a parent entity for some governmental purpose."

In the case of Standard Oil Co. v. National Surety Co., 107 So. 559, "political subdivision" is described as "a subdivision of a State to which has been delegated by law various functions of local self-government."

The Supreme Court of Missouri has held that counties, the City of St. Louis and townships are political subdivisions. (Missouri Tp., Chariton County v. Farmers' Bank of Forrest Green, 12 S. W. (2d) 763; Volz et ux. v. City of St. Louis, 32 S. W. (2d) 72, 326 Mo. 362; Barton County v. Walser, 47 Mo. 189.)

Therefore, the Missouri law, to comply with the federal requirement, must be in effect in every county, township and in the City of St. Louis. There is no statute that restricts the operation of the plan to any county or counties, locality or part of the State, but rather under Section 8893, supra, provides that it shall be available to every adult blind person who meets the residence requirements.

The question then presents itself whether the Missouri law provides for administration by these political subdivisions.

Section 8896, R. S. Mo. 1929, provides for the administration of the State plan and reads as follows:

> "Any person who desires the benefits of this article shall apply to the judge of the probate court within his or her county or city or to the commission for the blind, who, if satisfied that the applicant comes within the provisions of this article, shall grant to the applicant a certificate of such fact and the certificates granted by the probate judges shall be certified to the Missouri commission for the blind at its office in St. Louis, Missouri, which shall consider the merits of such application and if approved by the commission, it shall certify same to the state auditor. * * * *"

The administration is therefore carried on only by the State Commission for the Blind and the Probate Judges of the various counties. The status of the latter group seems to be one of local representatives of the commission whose duties are to interview the petitioners and refer them to the commission. Therefore, the political subdivisions, mentioned above, have nothing to do with the administration of the pensions and consequently the law cannot be mandatory upon them. Ragan v. Commission for the Blind, 271 S. W. 1014.

It appears that the Missouri Blind Pension Law meets all the requirements as set forth in the first stipulation of the federal act.

III.

Financial participation by the State is provided for by the Constitution of Missouri.

Section 1002, Article X of the Federal Social Security Act, states that the State plan must "provide for financial participation by the State."

Article IV, Section 47, of the Constitution of Missouri reads as follows:

> "That the General Assembly of the State of Missouri shall cause an annual tax of not less than one half of one cent nor more than three cents on the one hundred dollars taxable property of the State to be levied for the purpose of providing a fund to be devoted in the manner provided by law to the pensioning of the deserving blind."

Section 8903, R. S. Mo. 1929, provides in part as follows:

> "In accordance with an amendment to section 47 of article IV of the Constitution of the state of Missouri, adopted by the qualified voters of the state on November 2, 1920, there is hereby levied during each year until otherwise ordered by the general assembly an annual tax of three cents (3c) on each one hundred ($100.00) dollars valuation of taxable property in the state of Missouri to provide a fund out of which shall be paid the pensions for the deserving blind as herein provided."

The above quoted provision and section provides for the financial participation which will be matched by the federal government.

IV.

The Missouri Act provides for a single State agency to administer the plan.

The federal statute under Point (3) provides that there must be a State agency to administer the plan.

Chapter 50, R. S. Mo. 1929, Sections 8889 to 8891 inclusive, Section 8888 and Section 8892, Laws of Missouri, 1933, page 191, provide for a Commission for the Blind, setting forth their appointment, duties and rights. Section 8888, supra, reads as follows:

> "The Missouri Commission for the Blind shall hereafter consist of the Members of the Board of Managers of the State Eleemosynary Institutions as now or hereafter provided for and constituted by Article 1, Chapter 46, Revised Statutes of 1929, and wherever in any law the Commission for the Blind is referred to it shall, after the taking effect of this act, be construed as referring to the members of the said Board of Managers of the State Eleemosynary Institutions, who are by this act designated and constituted the members of said Commission for the Blind. The officers of the Board of Managers of the State Eleemosynary Institutions shall be the officers of the Commission for the Blind as herein constituted. "

Missouri, therefore, has a State agency which can administer the plan, thereby meeting the requirements of the third stipulation.

V.

The Missouri Blind Statutes provide for granting to an individual whose claim for aid is denied an opportunity for a fair hearing before such State agency.

Section 1002, Article X, of the Social Security Act states that the State plan must "provide for granting to any individual, whose claim for aid is denied, an opportunity for a fair hearing before such State agency."

Section 8896, R. S. Mo. 1929, provides:

> "Any person who desires the benefits of this article shall apply to the judge of the probate court within his or her county or city or to the commission for the blind."

Section 8901, R. S. Mo. 1929, reads as follows:

> "Any person claiming the benefits of this article who is aggrieved by the action of the commission for the blind as to his or her property or income, residential or moral qualifications to receive the benefits of the article, may appeal from its decision to the circuit court of his or her judicial circuit * * *."

It may appear from the reading of Section 8896, supra, wherein it states that persons shall apply to the judge of the probate court or the Commission for the Blind, that the applicant who elects to appear before the probate court and his application has been refused, does not have the right to have his case heard before the Commission for the Blind.

However, this point was determined in the case of Ragan v. Commission for the Blind, 271 S. W. 1014, which involved an appeal to the circuit court direct from the decision of the probate judge refusing the application of the appellant. The court said:

> "It would seem that the presentation of the application to, and the hearing before, the probate judge is in the nature of a mere preliminary matter for the convenience of the blind person, who is permitted to make his application there first, if he chooses, for the commission is the body which is to pass on the merits of all applications, even those made to the probate judge; and, this being the case, and the statute being silent as to the procedure to be had by the applicant where the probate judge refuses a certificate, the only thing the applicant can do would seem to be to take the matter from there to the commission itself; that is, by availing himself of the other privilege of applying to the commission."

The court held that the applicant could appeal to the circuit court only from the order of the commission under Section 8901, and therefore if refused by the probate judge, he should apply

to the commission, and then if refused by the commission, he could ask the circuit court to review the order of the commission.

In view of the above case, it seems that the Missouri law allows for a hearing before the State agency if the claim for aid before the probate judge is denied. However, it is the opinion of this department that it would be more salutary if Section 8901 were amended so that the right to a review before the State agency by one refused by the probate judge be explicitly set forth in the statute. The reason is that the statute does not give the right in so many words, but it must be inferred by judicial interpretation. Also, the case quoted above is a decision of the Kansas City Court of Appeals, which may not be final authority.

The question next presents itself whether the Missouri law affords an opportunity for a fair hearing by the State agency if the applicant presents his claim to the Commission for the Blind in the first instance and is refused. The Federal act states that one "whose claim for aid is denied" must have "an opportunity for a fair hearing" before the State agency.

The Missouri law gives one the right to apply in the first instance to the State agency, i. e., the Commission for the Blind. Section 8896, supra. If he is aggrieved by its ruling he may then apply to the circuit court for review. Section 8901. Nowhere is mention made of a "hearing" before the Commission on its own ruling. While such a proceeding might seem to be a repetition and duplication, still it appears necessary in order to comply with the federal requirement.

It is, therefore, the opinion of this department that Section 8901, R. S. Mo. 1929, should be amended so that a hearing before the Commission for the Blind should be allowed to one whose application has been refused by the probate judge or the Commission.

VI.

Missouri plan provides for an efficient administration.

Section 1002, supra, of the Federal Social Security Act provides that the State plan must "provide such methods of administration (other than those relating to selection, tenure of office, and compensation of personnel) as are found by the Board to be necessary for the efficient operation of the plan; * * **.

Section 8889, R. S. Mo. 1929, reads as follows:

"The duties of said commission shall be to prepare and maintain a complete register of the blind persons within this state and to collate information concerning their physical condition, cause of blindness and such additional information as may be useful to the commission in the performance of its other duties as herein enumerated, and to investigate and report to the general assembly from time to time the condition of the blind within this state, with its recommendations concerning the best method of relief for the blind; to adopt such measures as the commission may deem expedient for the prevention and cure of blindness; to establish and maintain at such places within this state as the commission may deem expedient shops and workrooms for the employment of blind persons capable of useful labor, and to provide superintendence and other assistance therefor and instruction therein; to compensate the persons so employed in the manner and to the extent that the commission shall deem proper; to provide such means for the sale of the products of the blind as the commission shall deem expedient; to act as a bureau of information for the purpose of securing employment for the blind of this state elsewhere than in the shops and workrooms of the commission, and to this end the commission is authorized to procure and furnish materials and tools and to furnish aid and assistance to blind persons engaged in home industries and to buy and sell the products of the blind wherever and however produced within this state; to provide for the temporary cost of the food, raiment and shelter of deserving blind persons engaged in useful labor; to ameliorate the condition of the blind by such means consistent with the provisions of this article as the commission may deem expedient: Provided, however, that no part of the funds appropriated

> by the state shall be used for solely charitable purposes; the object and purpose of this article being to encourage capable blind persons in the pursuit of useful labor and to provide for the prevention and cure of blindness."

Section 8891, R. S. Mo. 1929, provides as follows:

> "Said commission may adopt by-laws or rules and regulations for its government; a majority of the commission shall constitute a quorum; it shall have power to appoint such agents and employes as it shall deem necessary and fix their compensation within the limits of the appropriation that shall be made by the general assembly; it shall hold regular monthly meetings, keep a full record of its proceedings and of its receipts and disbursements, and shall, on or before the first Monday in January of each biennial period, make a full report to the general assembly, presenting a concise review of the work of the commission for such period, with recommendations looking to the amelioration of the blind in this state."

Section 8892, R. S. Mo. 1929 (now Section 8892, Laws of Missouri, 1933, page 191) reads as follows:

> "The officers and members of the Commission hereby created shall receive no salary or other compensation for their services as officers or members of the Commission for the Blind, but their traveling expenses and other necessary expense in the performance of their duties as officers and members of the Commission for the Blind may be allowed and paid them out of any funds that may be appropriated by the State for the use of said Commission."

The Missouri statutes above provide for an administration of the plan. Whether such administration is efficient is for the Federal Board to decide and not this department.

VII.

The Missouri Legislature must enact a statute requiring the Commission for the Blind to make such reports as the Board may from time to time require.

Section 1002, supra, states that the State plan must "provide that the State agency will make such reports in such form and contain such information, as the Board may from time to time require, and comply with such provisions as the Board may from time to time find necessary to assure the correctness and verification of such reports."

The requirement stated above must be met by the State plan before such plan will be approved by the Board. It is mandatory that the State plan must specifically include this stipulation. The Missouri Blind Pension Act contains no such statute. Due to the fact that the Missouri Act was passed before the Federal act, it could make no reference to such Federal act. Therefore, the Legislature must pass a statute which will meet this requirement.

VIII.

Missouri allows no one who is a recipient of old age assistance to receive a pension under the Blind Pension Act.

Section 1002, Federal Social Security Act, supra, reads that "the State plan must" provide that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old-age assistance under the State plan approved under Section 2 of this Act.

Section 16, Laws of Missouri, 1935, Pensions and Retirement Funds, at page 312, reads as follows:

> "No person receiving assistance under this Act shall at the same time receive any other relief from any public funds, except for medical and surgical assistance."

The Missouri Old Age Assistance law, therefore, forbids any one who is receiving old age assistance from receiving any other pension. While this statute probably fills the federal requirement, the Legislature may, to conform with the federal act unreservedly, enact a statute that affirmatively sets forth this inhibition.

IX.

The Legislature must amend the law in regard to residence requirement in order to comply with the federal act.

Section 1002, Title X, Federal Social Security Act, states:

> "The Board shall approve any plan which fulfills the conditions specified in subsection (a), except that it shall not approve any plan which imposes, as a condition of eligibility for aid to the blind under the plan--
>
> "(1) Any residence requirement which excludes any resident of the State who has resided therein five years during the nine years immediately preceding the application for aid and has resided therein continuously for one year immediately preceding the application."

Section 8893, R. S. Mo. 1929, reads as follows:

> "Every adult blind person, twenty-one years of age or over, of good moral character, who shall have been a resident of the state of Missouri for ten consecutive years or more next

> preceding the time for making application for the pension herein provided, and every adult blind person, twenty-one years of age or over, who may have lost his or her sight while a bona fide resident of this state and who has been a continuous resident thereof since such loss of sight, shall be entitled to receive, when enrolled under the provision of this article, an annual pension as provided for therein, payable in equal quarterly installments: * * *."

The above quoted Missouri statute is in conflict with the federal requirement and must be amended to comply with the federal Act.

X.

The Missouri plan does not have any citizenship requirement which excludes any citizen of the United States.

Section 1002, Federal Social Security Act, supra, provides that the Board shall not approve any plan which imposes "any citizenship requirement which excludes any citizen of the United States."

The Missouri plan does not have any statutes in relation to this matter and therefore meets the requirements of the above federal section.

Respectfully submitted,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

AO:HR

ELECTIONS:- Number of Judges to a Precinct.

October 10, 1936 10/17

FILED
61

Honorable C. W. Meyer
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We are in receipt of your letter of October 6, 1936, requesting an opinion, which reads as follows:

> "The County Court is putting it up to us like this: The last general election being in an off year there were a number of precincts where less than three hundred votes were cast, but this year the registration in some of these precincts was almost double three hundred. Now the Court wants to know whether they may appoint additional Judges and Clerks in some of these precincts where they have every reason to believe the vote in the general election will exceed three hundred, the registration being greatly in excess of three hundred.
>
> "My own personal opinion is that in these matters it is never safe to disregard the statutes, or in other words that the statutes should be closely followed, except where an emergency exists, or to save unreasonable work on the part of the Election Board and undue delay of election returns. At any rate I trust I have stated clearly the question of the County Court and we would greatly appreciate an opinion from your office upon the proposition indicated."

Section 10206 R. S. Missouri 1929, provides for the appointment of four election judges to a precinct, same to be appointed by the County Court. This section also provides the method to be followed in receiving and counting the ballots by all judges and clerks.

Laws of Missouri, 1933, p. 238, Section 10208 provides:

> "In all precincts in this state that at the last preceding general election cast three hundred or more votes, at the same time and in the same manner as judges of election are appointed or elected, two additional judges of election for each such election district in the state shall be appointed or elected; three of the judges shall be taken from the political party that polled the largest number of votes at the last preceding general election and three of the judges from the party that polled the next largest vote. The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters in the manner hereinafter provided."

Laws of Missouri, 1933, p. 239, Section 10211, provides:

> "In all precincts casting less than three hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting three hundred or more votes in the last preceding general election, the judges shall appoint four clerks. The clerks, before entering on the duties of their appointment shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, that they will faithfully record the names of all the voters; said clerks shall also take the oath above prescribed for judges to be administered at the same time and in the same manner heretofore directed."

Prior to the Session Acts above quoted, the Statutes made it possible to place six judges and four clerks in any precinct election district at a general election. At that time many county courts in Missouri were prone to hold down county general election expenses by appointing only four judges and two clerks, in spite of the existing laws allowing six judges and four clerks. In the case of Sanders vs. Lacks, 142 Mo. 255, an attempt was made to invalidate an election because of the desire of a County Court to save election expenses, and at the same time keep the official personel in an election district down to a number that could handle the voting in a precinct, and at the same time not be in each other's way. In that case the Supreme Court refused to invalidate the election, even though the County Court failed to avail themselves to the power of the then existing Statute and appoint six judges and four clerks, and at l. c. 263, the Court said:

> "Popular elections involve the exercise of one of the most cherished rights of the citizen in a free government. But the right of suffrage must needs be exercised under conditions which do not always admit of a rigid observance of every technical requirement of law. The judges of election who manipulate the machinery necessaary to record the expression of the voters' will are usually laymen, unfamiliar with legal technicality, and often wholly innocent of that sense of the importance of matters of mere form which often seems to possess a strange facination to some learned minds. Election judges are drawn from the great body of the people. They serve for a short while. In the main they do their best to faithfully perform their duties under the law. But they are often guilty of omissions and oversights in attempting to follow the strict letter of the law. In dealing with those lapses the courts have promulgated a practical general rule which seems to have a direct bearing upon the appeal at bar. That rule is thus stated by the most eminent American text writer of the law of this subject, viz: 'if the

> statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not delcare that their performance is essential to the validity of the election, then they will be regarded as mandatory, if they do, and directory, if they do not, affect the actual merits of the election.' McCrary, Elections (4 Ed.) sec. 225. The use of the terms 'mandatory' and 'directory' in this connection is, no doubt, sanctioned by usage in the law of elections by ballot. The terms are sometimes misleading and not strictly accurate; but they are convenient to point out the distinction between two general classes of irregularities, and they are sufficiently well understood to keep their places in the literature of the subject in hand."

CONCLUSION.

We are of the opinion that in precincts where three hundred persons or less voted in the last general election, the county court's duty is to appoint four judges and two clerks. The Statute is plain in its mandate, and a county court can not assume powers not given them by the Constitution and Statutes. We know of no way that more than four judges in a precinct of three hundred or less voters at the preceding general election could be legally paid by the County Court for election services.

We are not holding in this opinion that an election would be invalid in a precinct where a county court arbitrarily appointed more than the statutory number of judges and clerks. Absent evidence of irregularities in the precinct effecting unfair election result, the Sanders case, supra, seems to hold that such conduct of county judges would not invalidate an election and disfranchise voters who were not at fault themselves.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

WOS:H

TAXATION: Form of Collector's Deed.

8-17

August 17, 1936

FILED
62

State Tax Commission
Jefferson City, Missouri

Attention of Mr. Jessie A. Mitchell

Gentlemen:

We are in receipt of your letter of this date requesting the advice of this office relative to the proposed Collector's Deed for taxes providing for the transfer of five tracts under one deed.

I beg to advise that we have examined this proposed form and that it is our advice that it conforms with the requirements of Senate Bill 94, page 425, Laws of Missouri 1923.

We are keeping one copy of the proposed deed for our files and returning the other copy to you.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

STATUTE OF LIMITATIONS: If officer voluntarily pays shortage of five years, he cannot demand refund for two years for the amount of shortage of two years.

September 23, 1936.

FILED
62

Mr. William L. Mitchell,
Judge of County Court,
Carroll County,
Bosworth, Missouri.

Dear Sir:

This department is in receipt of your letter of September 21, wherein you make the following inquiry:

> "In the Spring of 1935, Carroll County was audited and the amounts due the county from the several township assessors set forth. This audit covered five years but later the ruling came that the audit could not go back but three years.
>
> "Now the question comes up as one assessor paid his full amount as charged for five years. Should the county repay him the difference from the full amount and the amount that he paid the State as due it for the three years? * * * "

It would appear from your letter that the assessor in question rightfully owed for five years, both to the state and to the county, but the Statute of Limitations prevents the collection for only three years. Therefore, the assessor could not under the law be compelled to pay for more than three years if he saw fit to plead the defense of the Statute of Limitations. Having paid the county the full amount, the question arises as to whether or not the assessor has waived the Statute of Limitations.

It is a well recognized principle of law that in order for a person to avail himself of the Statute of Limitations, the same must be specifically pleaded. In the instant case we assume that there was no action brought against the assessor, but that the payment on his part was purely voluntary.

The question of waiver was discussed in the case of Conkling v. Henry Quellmalz Lumber & Mfg. Co., 34 S.W. (2d) 990, wherein the Court said (l.c. 992):

> "In arriving at the conclusion that under the facts in this case the defendant waived for all time its right to invoke the statute of limitations to plaintiff's amended petition, we have in mind the line of cases which the defendant calls to our attention which lay down the broad rule to the effect, that, where a motion for new trial has been sustained, the case then stands as though there had never been a trial. Brayton v. Gunby (Mo. App.) 267 S.W. 450, l.c. 452; Hurley v. Kenally, 186 Mo. 225, l.c. 228, 229, 85 S.W. 357; Star Bottling Co. v. Exposition Co., 240 Mo. 634, l.c. 639, 144 S.W. 776. This general rule, however, has its exceptions as is evidenced by those cases which we have cited above to the effect that, where the defendant, by answering plaintiff's amended petition after motion to strike on the ground of departure, files his answer, the defendant thereby waives for all time the right to invoke such plea. So, too, privilege, as that between a patient and physician, once being waived, cannot thereafter be invoked and is therefore conclusive on retrial. Ryan v. Met. Life Ins. Co. (Mo. App.) 30 S.W. (2d) 190, l.c. 194, and cases cited; Elliott v. Kansas City, 198 Mo. 593, 96 S.W. 1023, 6 L.R.A. (N.S.) 1082, 8 Ann. Cas. 653; State v. Long, 257 Mo. 199, 165 S.W. 748."

And in the case of Landers Lumber Co. v. Short, 81 S.W. (2d) l.c. 376, the Court said:

> "It is conceded in this case, we think, that the proceedings in the justice court were a nullity, since the amount involved exceeded the jurisdiction of the justice of the peace. It is also

conceded on both sides that, unless the plea of the statute of limitations has been waived by the pleadings, the claim of Prosperi is barred. It was so held in McPherrin v. Lumber Men's Supply Company, 211 Mo. App. 385, 242 S.W. 136, and Redlon v. Badger Lumber Company, 194 Mo. App. 650, 189 S.W. 589. In the McPherrin Case, supra, it was further held that the statute is one of limitation and must be pleaded in order to avail defendant. To the same effect is the case of American Radiator Company v. Conner Plumbing & Heating Co., 277 Mo. 548, 211 S.W. 56, as well as a number of other cases. It is also well established that the statute of limitations may be waived by the filing of a general denial, particularly where the bar of the statute appears upon the face of the petition. Conkling v. Henry Quellmalz Lumber & Mfg. Co., 225 Mo. App. 494, 34 S.W. (2d) 990. The latter case further holds, and we think correctly, that the statute, having once been waived by answer, cannot subsequently be invoked, absent a departure."

CONCLUSION

It is the opinion of this department that the Assessor mentioned in your letter has waived his right to any refund by paying the full shortage for the five years.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

TAXATION: Approved form for county collector's deed when grantee assignee

November 19, 1936.

FILED
62

State Tax Commission
Jefferson City, Missouri

Attention of Mr. Jesse A. Mitchell.

Gentlemen:

We are in receipt of your request of November 12, 1936, requesting the approval of this Office on the proposed form of collector's deed under the Jones-Munger Law to be used when the purchaser has assigned the certificate of purchase.

We have gone over this proposed deed and believe that it is sufficient for the purposes proposed. We have, however, made one or two suggested changes which we have placed between the red check marks on the enclosed proposed form. Our recommended form is idential with that submitted with the exception of these additions.

I herewith return to you the form forwarded together with a copy of the suggested form.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:MM
Enclosures.

BANKS AND BANKING: Banks have authority to pledge assets to secure loans for purposes of merger or consolidation.

January 17, 1936. 1-18

FILED 63

Honorable O. H. Moberly
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge receipt of your letter of January 16, 1936, in which you request the opinion of this Department on the question submitted by Mr. Francis C. Brown, Counsel, Federal Deposit Insurance Corporation, to you in his letter dated January 14, 1936. We herewith set forth both letters as follows:

"I am enclosing herewith a copy of a letter dated January 14, 1936, received via Air Mail from Mr. Francis C. Brown, Counsel, Federal Deposit Insurance Corporation, Washington, D. C.

"At the present time we have several cases pending where, in order to effect the consolidation, it will be necessary for the selling bank to make application for a loan from the Federal Deposit Insurance Corporation under Paragraph 4 of Subsection (N) of Section 12B of the Federal Reserve Act, as amended.

"I, therefore, shall very much appreciate it if you will give immediate attention to rendering the opinion requested in the attached letter.

Yours very truly,

(Signed) O. H. MOBERLY
Commissioner of Finance."

"With reference to the banks which were recently a subject of discussion between you and Mr. Crowley as possible applicants for loans from this Corporation under Paragraph 4 of Subsection (N) of section 12B of the Federal Reserve Act, as amended, we would like to have you furnish us with an opinion from the Attorney General of your State with respect to the right of the institutions in question to borrow money in the amounts proposed and to pledge the assets of the kind and value contemplated in each instance.

"In the event your Attorney General has already rendered an opinion dealing with the extent to which banks may borrow money and pledge assets, this may suffice but in the event that no such opinion has been rendered it will be necessary that we be furnished with a general opinion on this subject in connection with any definite proposal which may be forthcoming concerning these banks.

Yours very truly,

(Signed) FRANCIS C. BROWN
Counsel. "

Your question pertains to the power and authority of banks in Missouri to pledge their assets and borrow money under the circumstances as outlined in Mr. Brown's letter.

We note from your letter that in order to effect the consolidation of the banks in question that it will be necessary for the selling bank to make application for a loan from the Federal Deposit Insurance Corporation under the provisions of Paragraph 4 of sub-section "(n)" of Section 12B of the Banking Act of 1935, Title 1 - Federal Deposit Insurance; which section is as follows:

> "Until July 1, 1936, whenever in the judgment of the board of directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or, with the approval of the Comptroller of the Currency, any receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans."

The power and authority of a bank to borrow money and pledge its assets as security for the loan has not been questioned in this State. In one of the earlier cases on the subject, decided in 1878, Ringling v. Kohn et al., 6 Mo. App. 333 l. c. 335 and 337, the court said the following:

> "The charter gave to the corporation general banking powers in terms such as are usually employed for that purpose. Sess. Acts 1857, p. 642, sect. 6. Nothing is said about borrowing money. But it is elementary law that a corporation may exercise any unforbidden power which is necessary to carry into effect the powers specially granted. It would be a strange limitation of the authority to purchase

exchanges, or to loan money, which should deny a simple means of obtaining occasional supplies for the purpose. A specific authority to borrow money rarely, if ever, appears in any bank charter. It has always been esteemed a necessary and inherent privilege, inseparable from the exercise of banking functions. Without it no bank, however ample its assets, could at times avoid insolvency. Curtis v. Leavitt, 15 N. Y. 9.

* * * * * * * * *

"In Barnes v. Ontario Bank, 19 N. Y. 156, the court said: 'That the power to borrow existed was determined by this court in the case of Curtis v. Leavitt. That the cashier, in virtue of his general employment, could exercise the power was not denied upon the argument, and the proposition does not admit of a reasonable doubt.'

"Said Story, J., in Fleckner v. United States Bank, 8 Wheat. 357: 'The acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed prima facie evidence that they fell within the scope of his duty.'

"The cases are numerous in which it is held that the cashier of a bank may, by virtue of the general nature of his employment, transfer to outside parties any of the notes, bills, or other securities belonging to the bank, and the transferees need look no further for his authority so to do than to the fact of his being the cashier. Kimball v. Cleveland, 4 Mich. 606; Lafayette Bank v. State Bank, 4 McLean, 208; Bank v. Wheeler, 21 Ind. 90; Robb v. Ross County Bank, 41 Barb. 586; Wild v. Bank, 3 Mason, 505."

What was said in the above case was cited approvingly in the case of Donnell v. Lewis County Savings Bank, 80 Mo. 165, wherein the court said,at page 170, the following:

> "'Where general banking powers powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor. 2. In order to show a cashier's authority to borrow money for his bank, it is not necessary to prove a power specially conferred upon him by the board of directors, or a distinct ratification by them of the act after its consummation; his acts done in the ordinary course of the business actually confided to him as such cashier, are prima facie evidence that they fall within the scope of this duty.' These positions are well supported by the numerous authorities cited and relied on by the court of appeals in its well considered opinion in said case, and we think state the law correctly, when applied to the facts in this case, as well as to that. (Cases cited.)"

In these cases the courts held that the cashier of a bank had a right to borrow money and pledge the assets of the bank to secure same. However, in 1895, by the Laws of Missouri, 1895, page 120, it was provided:

> "* * * The cashier or any other employe shall have no power to endorse, sell, pledge or hypothecate, any notes, bonds, or other obligations received by said corporation for money loaned, until such power and authority shall have been given such cashier or employe by the board of directors. * * * *"

This statute has been amended and it now stands as Section 5380, Revised Statutes of Missouri, 1929, and is the present

statutory law on the subject. The pertinent part of said section provides as follows:

> "* * *The cashier or any other officer or employe shall have no power to endorse, pledge or hypothecate any notes, bonds or other obligations received by said corporation for money loaned until such power and authority shall have been given such cashier or other officer or employe by the board of directors, pursuant to a resolution of the board of directors, a written record of such proceeding shall first have been made; and a certified copy of said resolution, signed by the president and cashier with the corporate seal annexed, shall be conclusive evidence of the grant of such power. * * * * *"

This section, by limiting the powers of the cashier to pledge the assets of the bank to secure borrowed money, recognizes the general powers of the bank to pledge its assets for the reason that the statute states that such authority must be by action of the board of directors. In addition, the borrowing of money and a pledging of the bank's assets to secure same, is a well-established policy and common practice in Missouri, notwithstanding the paucity of cases on the subject in this State.

As was said by the Supreme Court of Missouri in the case of Cantley v. Little River Drainage District, 2 S. W. (2d) 607, l. c. 611:

> "These sections place limitations on officers of the bank as to certain named things, which includes the hypothecating of the bank's notes and securities, but they do not limit the bank itself, when acting through its directors. That the bank itself can borrow money and pledge its notes as security for the payment thereof cannot be questioned. It is done every day in the commercial world. Nor is there any limitation as to the person or corporation from whom it may

> borrow. When we say that banks cannot borrow money we have gutted the modern banking business. When we say that the bank can borrow money, we mean when acting through its board of directors and the authority given by such board of directors to other agents of the bank."

It is, therefore, the opinion of this Department that State banks in Missouri have the general power to borrow money and pledge the assets of the bank to secure same, and it is our further opinion that the banks, under the circumstances mentioned in your letter, would have authority to pledge their assets to secure said loans upon a duly authorized resolution of the board of directors of said banks.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

BANKS & BANKING: Unanimous consent of all stockholders, preferred and common, required of altered Articles of Agreement; Section 10, Article XII, Missouri Constitution; Laws of Mo. 1933, pp. 406-408.

2-10

February 8, 1936.

FILED 63

Hon. O. H. Moberly
Commissioner of Finance
State of Missouri
Jefferson City, Missouri

Dear Mr. Moberly:

This is to acknowledge your letter of January 27, 1936, in which you request the opinion of this Department, which letter is as follows:

> "I am enclosing herewith a copy of a letter received under date of January 20th from the Iron County Security Bank, Ironton, Missouri, which is self-explanatory.
>
> "For your information the amendments to the articles of agreement referred to in the copy of the letter enclosed provide for striking out certain sections of the original articles adopted at the time of issuing preferred stock under the provisions of Section 10 of Article XII of the Constitution of Missouri. For your further information I quote from the statement containing the amendments to the articles of agreement, as follows:
>
> "'The foregoing resolution was adopted at the Annual Stockholders' meeting of the Iron County Security Bank, Ironton, Missouri, held on the 14th day of January, 1936, by a vote representing all of the Preferred Stock of the Corporation, and in excess of two-thirds of the Common Stock of the Corporation.'

> "The question upon which I desire an opinion is whether or not less than unanimous consent of all stockholders can amend any of the provisions pertaining to the issue of preferred stock after the preferred stock has been originally issued with the consent of all common stockholders, as provided for in the section of the Constitution above referred to."

The question which you ask is whether or not the original articles of agreement of a banking corporation at the time of issuing preferred stock therein under the provisions of Section 10, Article 12, may be altered and changed by a vote representing all of the preferred stock of the banking corporation, and in excess of two-thirds of the common stock of said corporation.

By the Laws of Missouri, shown at page 406-408, Laws of 1933, Section 1, "banks, trust companies doing a banking business, and other financial institutions organized, incorporated, and existing, under the laws of this State and subject to the jurisdiction of, and control by, the Finance Commissioner of the State of Missouri, any such corporation may, with the consent of all its stockholders, issue and sell its shares of preferred stock, of one or more classes, subject to the provisions of this act and the approval of the Finance Commissioner of the State of Missouri."

And Section 5 of said act provides as follows:

> "The preferences and priorities, and the terms and conditions governing the call, redemption, and retirement, of each class of the preferred shares issued by any corporation under authority of this act shall be clearly set forth in the amendment to its charter authorizing the issuance and sale of such preferred shares, in the case of all such corporations organized and existing prior to the effective date of this act and in the

> articles of agreement for the incorporation of all such corporations hereafter organized and incorporated, all of which shall be approved by the Finance Commissioner of the State of Missouri."

This amendment of the statutes of Missouri authorized banks and trust companies to issue and sell preferred stocks in their institutions and ware governed and subject to the general corporation laws of Missouri relating thereto, insofar as they may be applicable to banks and trust companies.

Section 10, Article XII of the Missouri Constitution, mentioned in your letter, provides as follows:

> "No corporation shall issue preferred stock without the consent of all the stockholders."

This provision of the Constitution does not mean that the original articles of agreement cannot be changed by agreement of the stockholders of the corporation, but it may be done so long as it does not contravene or violate the laws of the State.

Your question narrowed down, then, means: May this change be made without the unanimous consent of all of the common stockholders of the bank.

Fletcher on Corporations, Vol. 11, Section 5296, says the following:

> "The contract between a corporation and the holders of its preferred stock cannot be changed, or their rights in any way impaired, without their consent, by any subsequent action of the corporation, if the certificate or articles of incorporation are amended so as to be prejudicial to the rights of pre-existing preferred stockholders, their rights will not be affected thereby or, under the terms of some statutes, they may demand payment for their shares."

The rule is announced in Clark & Marshall, Private Corporations, Vol. 2, page 1312, sub-division "B", in identically the same language as is used in Fletcher on Corporations, above quoted.

In Thompson on Corporations, 3d Edition, Vol. 5, Section 3611, the following is said:

> "As suggested in the preceding section the relation between the preferred stockholder and the corporation, as well as between the stockholders themselves, is contractual, and the contract measuring the relation may embody any ordinary conditions not opposed to the articles of association or by-laws, and not contrary to law or public policy. The terms of the contract and the conditions on which preferred stock are issued and held, are usually but not necessarily set out in the certificate. The contract is to be construed in the light of the general law, the charter, the by-laws and the vote and proceedings authorizing the issuing of the stock."

We are of the opinion that, in view of the fact that the original articles of agreement, which are attached to your letter of request, are changed and altered in many respects, you should require the bank in question to have the unanimous consent of all of the stockholders of said bank to make such changes.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

EMPLOYMENT BUREAUS: County Court has no authority to issue warrant on county treasury for maintenance of the State Employment Bureau.

3-6

March 4, 1936.

FILED
63

Hon. John E. Mooney,
County Counselor,
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of February 25 wherein you make the following inquiry:

> "I have been instructed by the county court to ask you for an opinion in the legality of issuing a county warrant in the sum of three thousand dollars made payable to the State Employment Bureau for the purpose of maintaining the bureau.
>
> "I instructed the court that in my opinion, since the State Employment Bureau was in no way a county institution nor under the control and domination of the county court that the county had no authority to grant said sum or any other sum. In my judgment the State Employment Bureau is distinctly a state organization, and is created and supported by the Legislature, and were the county court to grant a sum of money out of the County Treasury, they would be acting beyond the scope of their authority and the treasurer who would issue the money would be personally responsible."

The original statute relating to employment bureaus being established in certain cities is Section 13187, R.S. Mo. 1929. In 1931 the Legislature repealed said section and enacted in lieu thereof a new section known as Section 13187 (Laws of Mo. 1931, p. 259), the only change appearing to be that the population in cities

was reduced from 75,000 to 50,000 inhabitants. In 1935 the Legislature repealed the law of 1931 and reenacted Section 13187, Laws of Mo. 1935, p. 288, so that said section reads as follows:

> "The commissioner of labor and industrial inspection shall organize and establish in all cities in Missouri, now containing or which may contain hereafter, according to the last preceding national census, fifty thousand inhabitants or more and in such other cities, towns or villages as he may deem necessary, a free public employment bureau for the purpose of receiving applications of persons seeking employment and applications of persons seeking to employ labor. No compensation or fee shall be charged or received, directly or indirectly, from persons applying for employment or seeking to employ labor through any such bureau."

We assume that in your county the county court is attempting to donate $3,000 to the employment bureaus which have been organized in your county under Secs. 13187 to 13194 inclusive, R.S. Mo. 1929. We have searched the statutes diligently but find no provision which makes it incumbent upon the county court to contribute any funds for the organization or operation of such bureaus. It appears, as stated in your letter, that the matter is handled exclusively by the Bureau of Labor and Industrial Inspection of the State of Missouri.

The powers of the county court are defined by statute, and if their acts are to be legal, they must come clearly within the purview of a statute or clearly by implication, as was said in the case of Major v. Patterson, 229 Mo. 373:

> "Where the county court had no power to make the order it did, no reason it may have assigned therefor is material or pertinent. No kind of a reason will justify an unauthorized act; nor will such express reason temperize the violation of law. The county court either did or did not have the right to act so that it is a pure question of power, and not otherwise."

In the case of Blades v. Hawkins, 240 Mo. 187, the Court said (Syllabus 2):

> "The power of the county court to contract, or to do any other act, must be found in an express legislative grant, or else implied as essential to the proper execution of powers expressly granted or duties expressly imposed. Nor will power to do a thing be implied to belong to a county court unless it is cognate to the purpose for which the court was created. Sec. 6759, R.S. 1899 (Sec. 2778 R.S. 1909), detailing the scope of the powers of a county court or other municipality, is but declaratory of the common law."

In the case of King v. Maries County, 297 Mo. 488, the Court, in speaking of the powers of a county court said (Syllabi 1 and 2):

> "A county court is not the general agent of the county, but has only such powers as are expressly given it by statute, with the qualification that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted.
>
> "The county court prior to 1921 (Laws 1921, p. 673) had neither express nor implied powers to employ the owner of a set of abstract books to make and furnish a list of the owners and a true description of all lands in the county embraced in back tax bills issued by the collector, and to pay him a designated sum for each list so furnished. The duty of collecting delinquent taxes and of bringing suit therefor, and of ascertaining the name of the owner of the land, and if not known, to whom the same was last assessed, had by statute been devolved upon other county officials, and hence the county court could not employ an abstracter of titles to make a list of the owners of land from whom back taxes were

> due, and though such abstracter complied with the terms of his employment he cannot recover from the county the moneys agreed to be paid him for his services rendered."

CONCLUSION

In view of the fact that there is no statute giving the county court authority to issue a warrant in the sum of $3,000 to the State Employment Bureau, and that we are not able to point to a statute which impliedly gives the county court such power, we are of the opinion that no such authority exists and that such an act would be outside the scope of the powers of the county court.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

TOWNSHIP BOARDS: Roads and bridge money may be spent on W. P.A. projects in lieu of usual maintenance demands.

April 30, 1936.

FILED 63

Honorable Merrill E. Montgomery
Prosecuting Attorney, Sullivan County
Milan, Missouri

Dear Sir:

We acknowledge your request for an opinion dated April 25, 1936, which reads as follows:

> "I am interested in an opinion from your office in regard to the legality of acts of a township board in appropriating money from their revenue raised by taxation for their Road and Bridge Fund, to aid in the construction of WPA projects.
>
> "As I understand the situation in our county, which is a county having township organization, township boards are in many instances appropriating money from the Road & Bridge Funds to be used on WPA projects. Most of the projects in question are for the purpose of crushing rock and hard-surfacing a road within the township. I find that taxpayers within the township object on the grounds that it depletes the Road & Bridge Fund to such an extent that the township is unable to furnish the usual maintenance for their roads.
>
> "I thought perhaps your office had ruled on this question heretofore, and if you have, I would appreciate a copy of your opinion."

Article IX, Chapter 86, R.S. Mo. 1929, provides for a Township Board of Directors and their duties. Section 12299 R. S. Mo. 1929, of this Article, reads:

> "In each township in this state, organized under the provisions of this chapter, there shall be a board

of directors, composed of the township trustee and members of the township board, whose duty it shall be: First, to audit all accounts of township officers for services rendered as such officers except the township assessor, for services as such assessor; second, to audit all other accounts or demands legally presented to them against the township; third, to levy all taxes for township, road and bridge purposes, and all other duties provided by this chapter for the township board of directors to perform."

Section 8149 R. S. Mo. 1929, provides:

"All road laws of this state shall apply to counties under township organization, unless by their terms limited to counties not under township organization, or in conflict with the provisions of this law."

Section 7946 R. S. Mo. 1929, provides:

"Whenever any public money, whether arising from taxation or from bonds heretofore or hereafter issued, is to be expended in the construction, reconstruction or other improvement of any road, or bridge or culvert, the county court, township board or road district commissioners, as the case may be, shall have full power and authority to contract, reconstruct or otherwise improve any road, and to construct any bridge or culvert in such county or other political subdivision of the state, and to that end may contract for such work, or may purchase machinery, employ operators and purchase needed materials and employ necessary help and do such work by day labor. The county court, the township board or road district commissioners may accept donations of labor or materials from interested parties either on road improvements or bridge constructions and said authority may employ labor or contractors to complete said

> improvements. Before beginning the construction or improvement of any road, bridge or culvert by day labor or by contract, the plans, specifications, estimates of drainage, maps, profiles, estimates of cost and the specific location of such road, bridge or culvert shall be filed in the office of the county clerk, township clerk, or commissioner or road district, as the case may be, and before becoming effective shall be approved by said county, township or road district authorities. On completion of the work a detailed statement of the cost shall be filed as in the next succeeding section provided, and shall be recorded in the book wherein are recorded contractors' bids; when any pay rolls or construction accounts are certified to as correct by the engineer in charge of the work, the bills for the same shall be passed upon by the county court, township board or district commissioner, and if found correct, shall be paid: Provided, that all such work shall be done under the supervision and direction of the county highway engineer, or some other competent engineer employed by the county court or other proper authority, at such compensation as may be agreed upon, payable wholly or in part out of the particular fund to be expended on said construction, reconstruction or other improvement."

CONCLUSION.

The Township Board of Directors are the auditing officers empowered with the duty to audit legal demands against the township. They are empowered also with the duty to levy taxes for township road and bridge pupposes.

The provisions of Section 7946, supra, are under the general road laws of this State and apply in counties under township organization. Where your board has raised

money for road and bridge purposes, it is specifically authorized to construct roads in the township, to contract for such work, to purchase machinery, employ operators and purchase needed materials.

We are of the opinion that the Board has the power to appropriate money from the road and bridge fund of the township to be used on W. P.A. projects, where said W. P. A. projects are identified as road or bridge projects within the township.

We are of the opinion that a W. P. A. Project to crush rock and hard surface roads within the township is purely a township road and bridge purpose for which the money was originally levied, and for which the Board in its discretion can spend the money in lieu of spending it on the usual maintenance demands.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

HIGHWAY PATROL: Concealed weapons subject to provisions of Section 4433 R.S. Mo. 1929, as a person.

June 1, 1936.

b-3

FILED
63

Captain R. E. Moore
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your request for an official opinion from this Department under date of May 8, 1936, which reads as follows:

> "We would like to have an opinion covering the following type of case. In various instances the State Highway Patrol, as an organization, has cause to receive, by express, various revolvers or pistols which are forwarded to this office by the Colt Company, either as new guns or forwarded after having been repaired at the Colt factory. These guns are all the property of the State Highway Patrol. In the past the express company has refused to deliver these firearms without first being given a permit issued by the circuit clerk and signed by the sheriff, authorizing the State Highway Patrol to receive this property.
>
> "It appears to us that the statute requiring such a permit should not apply to a state police organization, inasmuch as we believe they are not to be considered as a person. We shall appreciate an opinion from you as to whether or not it will be necessary, in order to conform with the law, for the Patrol to secure a permit on each gun received. It should be borne in mind that some of these guns are returned to the factory several times for adjustment and repair, and in the past it has been necessary to secure permits on some guns more than once."

In answering this request it is necessary that we construe the meaning of the words "no person" appearing the first line of Section 4433, R.S. Mo. 1929, which provides:

> "No person, other than a manufacturer or wholesaler thereof to or from a wholesale or retail dealer therein, for the purposes of commerce, shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon. Such permit shall be issued by the circuit clerk of the county in which the applicant for a permit resides in this state, if the sheriff be satisfied that the person applying for the same is in good moral character and of lawful age, and that the granting of the same will not endanger the public safety. The permit shall recite the date of the issuance thereof and that the same is invalid after thirty days after the said date, the name and address of the person to whom granted and of the person from whom such weapon is to be acquired, the nature of the transaction, and a full description of such weapon, and shall be countersigned by the person to whom granted in the presence of the circuit clerk. The circuit clerk shall received therefor a fee of fifty cents. If the permit be used, the person receiving the same shall return it to the circuit clerk with-

> in thirty days after its expiration, with a notation thereon showing the date and manner of the disposition of such weapon. The circuit clerk shall keep a record of all applications for such permits and his action thereon, and shall preserve all returned permits. No person shall in any manner transfer, alter or change any such permit or make a false notation thereon or obtain the same upon any false representation to the circuit clerk granting the same, or use or attempt to use a permit granted to another."

It is a fundamental rule of construction that a statute should be construed so as to ascertain and give effect to the legislative intent expressed therein in Grimes v. Reynolds, 184 Mo. 679, l. c. 688, the Court said:

> "'The object of all rational interpretation is to reach the true intent and meaning of the law-making authority as expressed in the language it has employed to convey its thought. All other rules are subordinate to that great one.
>
> "'Another principle of interpretation which must be closely adhered to is to consider all the statutes treating of the same subject-matter, so that the meaning of any particular provision may be enlightened by a view of the general purpose pervading the entire law of the subject."

In using the words "No person, other than a manufacturer or wholesaler thereof" in Section 4433, supra, we are of the opinion that the Legislature fully intended to include everyone except those expressly exempted, namely, manufacturer or wholesaler. It is a well known cannon of statutory construction that an "expression of one thing is the exclusion of another." In State ex inf. Conkling, ex rel. Hendricks, v. Sweaney, 195, S.W. 714, l. c. 716; 270 Mo. 685, the Court said:

> "Section 10881, in its present form, was enacted in 1909. Laws 1909, p. 819. Prior to that time it has been expressly held by this court that the law providing for division of common school districts did not apply to village school districts. State ex rel. v. Fry, 186 Mo. 198, 86 S. W. 328. Such being the case, the Legislature, when it enacted section 10881, knew that the provisions of section 10837, relating to the division of on common school district into two new districts, would not apply to town or consolidated districts, unless it so provided in the act; and knowing this to be true, and failing to so provide, it would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well-known canon of statutory construction, viz. that the expression of one thing is the exclusion of another."

The Legislature in using the above words "no person, other than a manufacturer or wholesaler" apparently intended to classify manufacturers and wholesalers as persons, and we infer from this construction by implication that the word "person" would include all persons natural or artificial, corporations, governmental agencies, etc. We are unable to locate any case exactly in point holding the word "person" in a statute to include or exclude a Highway Patrol. However, there are many definitions given for the word "person" as used in various sections in the Revised Statutes of 1929, and hardly without exception the word "person" as intended to be used by the Legislature includes individuals, firm, corporation, partnership, association, and in many instances municipalities and other governmental agencies.

Section 4478 is a part of Chapter 30, R. S. Mo. 1929, as is Section 4433, supra, and defines "person" as follows:

> "When the term 'person' is used in this statute to designate the party whose property may be the subject of any offense, such term shall be construed to include the United States, this state or any other state, government or country, a county, or any other municipal, public or private corporation, which may lawfully own any property within this state, as well as individuals."

In State v. Broeker, 11 S. W. (2d) 81, l. c. 83, the Court said:

> "It is well understood that the object of all rational construction of statutory enactment is to seek out and effectuate the purpose and intent of the lawmaking body in enacting the same; that such intent is to be determined from a general view of the entire act with reference to the subject-matter to which it applies; and that sections of the same act relating to the same general subject, and enacted at the same time, must be read and construed together in interpreting the act and parts thereof. State ex rel. v. Davis, 314 Mo. Sup. 373, 284 S. W. 464; Palmer v. Omer, 316 Mo. 1188, 295 S. W. 123; Betz v. Kansas City Southern Ry. Co. 314 Mo. 390, 284 S.W. 455; Consolidated School District v. Hackmann, 302 Mo. 558, 258 S.W. 1011."

Section 361 U.S. Criminal Code, Title 18, prohibits concealed weapons being deposited in the mails except under such regulations as the Postmaster General shall prescribe for use and connection with the official duty of certain officers. This Section provides as follows:

> "Pistols, revolvers, and other firearms capable of being concealed on the person are hereby declared to be nonmailable and shall not be deposited in or carried by the mails

> or delivered by any postmaster, letter carrier, or other person in the Postal Service: Provided, That such articles may be conveyed in the mails, under such regulations as the Postmaster General shall prescribe, for use in connection with their official duty, to officers of the Army, Navy, Marine Corps, or officers' Reserve Courps; to officers of the National Guard or Militia of the several States, Territories, and Districts; to officers of the United States or of the several States, Territories, and Districts whose official duty is to serve process of warrants of arrest or mittimus of commitment; to employees of the Postal Service; and to watchmen engaged in guarding the property of the United States, the several States, Territories, and Districts: And provided further, That such articles may be conveyed in the mails to manufacturers or firearms or bona fide dealers therein in customary trade shipments, including such articles for repair or replacement of parts, from one to the other, under such regulations as the Postmaster General shall prescribe. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail according to the direction thereon, or at any place to which it is directed to be delivered by the person to whom it is addressed, any pistol, revolver, or firearm, declared by this section to be nonmailable, shall be fined not exceeding $1,000 or imprisoned not more than two years, or both."

In State ex rel. Williams v. Purl, 128 S. W. 196, 228 Mo. 1, the Court held where words having a well defined meaning at common law and in ordinary use are used in a statute, the presumption is that they are used in their usual sense. Following is the definition of "person" given by Webster's International Dictionary:

> "'Person' A human being (natural person), or a body of persons, or, in a wider sense, an aggregate of property (artificial, conventional, or juristic person), that is recognized by law as the subject of rights and duties."

Funk and Wagnall's New Standard Dictionary defines "person" as follows:

> "Any human being, corporation, or body politic having legal rights and duties."

CONCLUSION.

From the foregoing it is the opinion of this Department that the Missouri State Highway Patrol must comply with the law as required of any person in Section 4433, supra.

Yours very truly

J. E. TAYLOR
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

ARH:H

COUNTIES: TOWNSHIP BOARDS: Township Board has no authority to borrow money except by issuing bonds pursuant to the statute.

August 6, 1936.

8-17

FILED
63

Honorable Rex H. Moore,
Prosecuting Attorney,
Grundy County,
Trenton, Missouri.

Dear Mr. Moore:

This acknowledges your letter which is as follows:

"I desire to request the services of your office in rendering an opinion on the following question:

"I have had members of two township boards in my office in the last few days asking whether or not a township board can legally borrow money to carry on the activities of the township in furnishing materials and equipment for WPA projects and for grading and maintaining township roads. In each instance the anticipated revenue of the township will exceed the amount of money which the township desires to borrow plus the maturing indebtedness of the township and its annual operating expenses.

"If your opinion is that the township board has such authority can the money be borrowed by the execution of promissory notes or by issuing of warrants to mature in the future? If not, by either method what is the proper method?

"I am advised by the members of these two boards that they are in somewhat of a hurry to learn the legality of the proposed action and, due to the fact that I am at

> this time engaged in the middle of a heavy term of court and have cases which necessitate my time in the circuit court, I would appreciate the services of your office in rendering this opinion as quickly as conveniently possible."

Section 3 of Article X of the Missouri Constitution provides:

> "Taxes may be levied and collected for public purposes only. * * *"

Section 12 of Article X of the Missouri Constitution, in part, provides:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness, * * * * * provided; That with such assent any county may be allowed to become indebted to a larger amount for the erection of court house or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein."

Said section also provides that concurrently with the incurring of such indebtedness, with the assent of the voters, an annual tax shall be provided sufficient to pay the interest on the debt as it falls due, and to provide for the payment of the principal thereof within twenty years from the date of so contracting such debt.

Section 12257 of Article 2 of Chapter 86, R. S. Mo. 1929, provides:

> "No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

Section 8149 of Article 15 of Chapter 42, R. S. Mo. 1929, provides:

> "All road laws of this state shall apply to counties under township organization, unless by their terms limited to counties not under township organization, or in conflict with the provisions of this law."

Section 8162 of said Article and Chapter provides that all taxes levied under the provisions of the Township Organization Laws applying to roads and bridges shall be collected in the same manner and at the same time as taxes for county purposes are now collected,

> "and all moneys arising therefrom shall be appropriated, set apart and kept as a special road and bridge fund, and shall be used for road and bridge purposes, and for no other purpose whatever."

Section 7960 of Article 5 of Chapter 42, R. S. Mo. 1929, provides:

> "The board of commissioners of any special road district organized and incorporated under the laws of this state, for and on behalf of such district, and the county courts of the several counties, on behalf of any township in their respective counties, are hereby authorized to issue road bonds to an amount, including existing indebtedness, not exceeding five per centum of the assessed valuation of such special road district or township, as the case may be, to be ascertained by the assessment next before the last assessment for state and county purposes. Such bonds shall be issued in denominations of one hundred dollars or some multiple

> thereof, to bear interest at not exceeding six per centum per annum, payable semi-annually, and to become due and payable at such times as the board of commissioners or county courts shall determine by order of record, not exceeding twenty (20) years from date of issue."

In the case of State ex rel. v. Forrest Smith, State Auditor, No. 35095, Supreme Court En Banc, May Term, 1936, (not yet officially published), one of the questions before the court was the authority of Buchanan County to issue $300,000 of Poor Relief Bonds to take care of the poor in that county. It was admitted there was no express statutory authority authorizing the county to issue such bonds, or to vote thereon. Relator contended that Section 12 of Article 10 of the Missouri Constitution authorized the county to issue bonds without express statutory authority provided (1) that the bonds were issued only for a county public purpose, (2) that the bonds were authorized by two-thirds of the voters of the county voting on the proposition, and (3) that the bonds and all other indebtedness of the county can not for general purposes exceed five per cent of the total assessed valuation of the taxable property of the county, to be ascertained by the assessment next preceding the last assessment previous to the incurring of the indebtedness.

The court cites the case of State ex rel. Clark County v. Hackmann, 280 Mo. 686, 218 S. W. 318, where Clark County submitted to the voters the proposition of incurring an indebtedness for over $100,000 and issuing bonds of the county therefor to pay judgments against the county. The bonds were authorized at a special bond election by a vote of more than two-thirds of the electors voting on the proposition. The court states that the validity of the bonds was sustained on the ground that Section 12 of Article 10 of our State Constitution in itself constitutes a grant of authority to contract indebtedness for a public purpose with the assent of two-thirds of the voters voting on the proposition and within the debt limitation specified in Section 12 of Article 10 of the Constitution, and further states:

> "We also held that the debt created by the bond issue was for a 'public purpose' within the meaning of Section 3 of Article 10 of our Constitution. On the authority of the case of State ex rel. Clark County vs. Hackmann, supra, we hold that Section 12 of Article 10 of our State Constitution is a self-enforcing grant of power permitting a county

> to incur indebtedness for a county public purpose if authorized by two-thirds of the voters of the county voting at an election on such proposition, if such indebtedness be within the amount permitted by the Constitution."

The court also holds that the $300,000 bond issue of Poor Relief Bonds is for a public county purpose within the meaning of the constitutional provision.

In the case of Sherlock v. Duck Creek Township, 92 S. W. (2d) 675, the authority of a township to issue bonds under the above quoted section so authorizing the same was approved.

If your township desires to borrow money by following the provisions of Section 7960, supra, and the question is submitted to and approved by two-thirds of the voters as therein provided, it would appear that the township has authority to borrow money in that way. From an examination of the statutes, we have not found any other provision authorizing the township as such to borrow money.

We are not now discussing the authority of the township to incur indebtedness, but are limiting these observations to its right to borrow money. Absent a statutory provision authorizing it to borrow money, and defining the method thereof, the township does not have authority to borrow money.

With reference to that part of your letter inquiring as to the authority of the township to expend revenue in carrying on the activities of the township in furnishing materials and equipment for WPA projects, and for grading and maintaining township roads, this office rendered an opinion dated April 30, 1936, to Honorable Merrill E. Montgomery, Prosecuting Attorney of Sullivan County, to the effect that where such township board "has raised money for road and bridge purposes, it is specifically authorized to construct roads in the township, to contract for such work, to purchase machinery, employ operators, and purchase needed materials," and said opinion further states:

> "We are of the opinion that the Board has the power to appropriate money from the road and bridge fund of the township to be used on W.P.A. projects, where said W.P.A. projects are identified as road or bridge projects within the township.

"We are of the opinion that a W.P.A. project to crush rock and hard surface roads within the township is purely a township road and bridge purpose for which the money was originally levied, and for which the Board in its discretion can spend the money in lieu of spending it on the usual maintenance demands."

CONCLUSION

It is our opinion that a township in a county that is operating under township organization has authority to borrow money in the manner provided by Section 7960, supra, by following the provisions thereof and bearing in mind the limitations of the Constitution, and that it does not have authority to borrow money in any other way.

We are further of the opinion that if you have the money on hand with which to carry on your WPA projects of the township, the same may be lawfully expended in cooperation with the WPA authorities in improving said roads.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

MOTOR VEHICLES: Maximum gross weight that may be carried by truck with trailer attached is 48,000 pounds.

8-19

August 18, 1936.

FILED
63

Mr. R. E. Moore, Captain GHQ,
Missouri State Highway Patrol,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of August 17, requesting an opinion as to the following:

> " * * * The Carnation Milk Company, Mt. Vernon, Missouri, is operating a tank truck and pulling behind it a four wheel trailer and desires to carry a maximum gross load of 24,000 pounds in the truck and a maximum of 24,000 pounds in the trailer. Tire sizes on both units will support this weight and distribution of weight on axles of both units is correct.
>
> "Is the gross load of 48,000 pounds permissable considering truck and trailer as two units with 24,000 pounds per unit or would the 38,000 pound gross limit for tractor-trailer combinations apply in this case?
>
> "Units in combination are now operating under Highway Department permit for about four ft. overlength, but with new equipment ordered, the combination will be within the 40 ft. road limit."

Section 7788, R.S. Mo. 1929 regulates the weight that may be carried by motor vehicles, tractors and semi-trailers, and provides:

> "No motor vehicle, except a combination of tractor and semi-trailer, the gross weight of which, including load, is more than 24,000 pounds, and no combination of tractor and semi-trailer, the gross weight of which, including load, is more than 38,000 pounds, and no motor vehicle having a greater weight than 16,000 pounds on one axle, and no motor vehicle having a load of over 600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim), shall be operated on the highways of this state: Provided, a combination of tractor and semi-trailer shall be considered a vehicle of six (6) wheels for the purpose of computing the distribution of the load."

We are not concerned with the provision in Section 7788, supra, relating to combinations of tractors and semi-trailers, as the statement of facts in your letter clearly shows that the question involves the weight that may be carried by a truck and trailer attached to said truck, no part of the weight of said trailer resting upon the towing vehicle. The question presented for solution, therefore, is whether a truck and trailer shall be considered as one motor vehicle or whether it shall be considered as two separate motor vehicles within the meaning of Section 7788.

A "motor vehicle", is defined in Section 7759, R.S. Mo. 1929 as "Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors." Under this definition, a trailer, such as is described in your letter could not possibly be considered a motor vehicle. However, in the case of State v. Schwartzmann Service, Inc. (St. Louis Court of Appeals) 40 S.W. (2d) 479, the Court had before it a question substantially similar to the one here presented, and in that case the defendant was charged with unlawfully operating a motor vehicle, to-wit, one trailer, the gross weight of which, including load, was more than 24,000 pounds. The case was tried before the Court without a jury on an agreed statement of facts, as follows:

On September 7, 1930, at the County of Warren, defendant operated on Highway No. 40, a truck train consisting of a tractor, semi-trailer and trailer, the trailer being a four-wheeled vehicle, not self-propelling, and none of the weight of which rested upon the semi-trailer and tractor, or either of them. At said time the

gross weight of said trailer, including load, was in excess of 24,000 pounds. The trial resulted in a judgment convicting the defendant of the offense charged in the information, and defendant appealed. It was defendant's contention that a trailer was not a motor vehicle within the meaning of the statute and therefore that it might be loaded without limit and so operated on the highways. The Court, however, in affirming the judgment of the lower court, held that the trailer was a motor vehicle within the meaning of Section 7788, limiting the weight of such trailer to 24,000 pounds. Specifically, the Court said:

> " * * * The title of the act under which this prosecution proceeds shows that the Legislature regards a trailer as a motor vehicle; * * * but there can be no question that a trailer attached to and propelled by such a motor vehicle, is itself, in a broad sense, motor propelled, and, in that broad sense is a motor vehicle."

In disposing of the definition of the term "motor vehicle", as defined in Section 7759, the Court said:

> "It is obvious that the Legislature never intended that such restricted definition should control the meaning of the term as used in the Act of 1925, on which this prosecution is based."

CONCLUSION

In view of the foregoing, it is the opinion of this department that a maximum gross load of 48,000 pounds is permissible on a tank truck with four wheel trailer attached--that is to say, 24,000 pounds on each vehicle. This ruling, of course, does not apply to a tractor attached to a semi-trailer, in which case the maximum weight permissible is 38,000 pounds.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

_____
Attorney General

JWH:AH

OFFICER'S QUALIFICATIONS: Assessor not entitled to qualify if owing delinquent city taxes.

MUNICIPALITIES:

June 26, 1936

6-27

FILED
64

Hon. L. I. Morris,
Prosecuting Attorney,
Lafayette County,
Lexington, Missouri.

Dear Sir:

We have received your request which is as follows:

> "At the request of Mr. H. F. Duensing, Mayor of the City of Concordia, Missouri, I wish to submit the following set of facts and respectfully request for the city of Concordia an opinion concerning the status of Otto Bredehoeft, City Assessor.
>
> "Otto Bredehoeft, the duly elected, qualified and acting Assessor for the City of Concordia, was re-elected at the last city election in April, 1936. The Board of Aldermen question the right of Mr. Bredehoeft to hold office on the ground that he was disqualified for failing to pay his city taxes. It seems that Bredehoeft and a Mr. Roepe were doing business in the city, a partnership arrangement under which they continued to do business over a period of several years. At the time of Bredeheoft's election the firm's taxes were five years in arrears and for that reason the Board of Aldermen question the right to hold the office to which he was elected and have refused to qualify him as City Assessor. The property and business on which this tax was assessed and is now unpaid is about to be foreclosed on by holders of the mortgage on the premises and the business.

> "I am told that Mr. Bredehoeft has written your office setting out the facts in the case and that your department stated that only through the Prosecuting Attorney's Office could this opinion be had. It is, therefore, respectfully requested that this opinion be given the undersigned.
>
> "For your information the City of Concordia is a city of the Fourth Class."

Tersely stated, we construe your request to be as follows:

> "A given individual is elected Assessor of a city of the fourth class. Such person so elected was previous to the election a partner with another, said partnership owning personal property, and at the time when the Assessor presents himself for qualification as such Assessor, the Board of Aldermen raise the question of his right to so be inducted into office, and assign as their reason therefor that the firm of which he was a partner now owes city taxes that are delinquent for five years next preceding this time."

Section 6951, R. S. Mo. 1929, among other things, provides that:

> " * * * the board of aldermen may provide by ordinance for the election of city assessor * * *."

Section 6960, R. S. Mo. 1929, provides:

> "The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a * * * city assessor * * *."

Section 6969 provides:

> "All officers elected or appointed to offices under the city government shall be

> qualified voters under the laws and Constitution of this state and the ordinances of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city."

Section 6970, among other things, provides:

> "Every officer of the city and his assistants, and every alderman, before entering upon the duties of his office, shall take and subscribe to an oath or affirmation before some court of record in the county, or justice of the peace in the township, or the city clerk, that he possesses all the qualifications prescribed for his office by law; that he will support the Constitution of the United States and of the state of Missouri, the provisions of all laws of this state affecting cities of this class, and the ordinances of the city, and faithfully demean himself while in office; which official oath or affirmation shall be filed with the city clerk."

It cannot be said that the Assessor-elect in question does not owe city taxes when the partnership of which he is a partner owes such delinquent city taxes. By the terms of Section 6969 the Assessor-elect is prevented from qualifying for such office under such conditions.

While your inquiry does not reveal whether your city council has enacted an ordinance under which the Assessor is elected, under the provisions of Section 6951, or whether he has been appointed under the provisions of Section 6960, it is immaterial whether he was elected or appointed, because Sections 6969 and 6970 lay the prohibition against his being inducted into office, regardless of whether he be appointed or elected to such office under city ordinances. And under the provisions of Section 6970, he would be swearing falsely that he possessed all the qualifications prescribed for his office by law, if he, either as an individual or as a member of a partnership, at that time owed delinquent city taxes.

CONCLUSION

It is our opinion that a person who is elected or appointed Assessor of a city of the fourth class is not entitled to qualify as such Assessor when he personally, either as an individual or as a member of a partnership, owes delinquent city taxes, and that a partnership of which he is a member or was a member at the time taxes accrued and became payable, which has not paid such taxes, is delinquent and in arrears with reference thereto, and that because of such relationship existing between him and the partnership, he is disqualified from being inducted into the office of Assessor as long as said taxes remain unpaid, but that if and when said city taxes are paid, the bar of their delinquency is removed and such prohibition would no longer exist.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

DW:HR

SCHOOLS: School of residence must pay excess over $50 of per pupil cost of its students attending high schools in other districts.

9-24

September 23, 1936.

FILED
64

Honorable L. I. Morris
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Morris:

This is to acknowledge your letter as follows:

"The members of the board of Woodland School District #72, Bates City, Missouri, have made a formal application to this office for an opinion from you concerning the school laws of the state of Missouri. It is therefore respectfully requested that your office supply me with an opinion on the following set of facts.

"Woodland School District #72, Lafayette County, Missouri, sent one Esther Minter to the Bates City, Missouri, Consolidated District, Lafayette County, Missouri, from September 2, 1929, to May 1933. On September 4, 1933, and continuing to May, 1934, one Juanita Morris was sent from the Woodland District #72 to the Bates City Consolidated District, and on February 26, 1936, to May, 1936, Edith and John Baslee were sent from Woodland District #72 to Bates City Consolidated District.

"Bates City consolidated District rendered a statement at the end of the school

term, ending in 1932, for the sum of $50.96 for pupil Esther Minter; and for the term ending in 1933 the sum of $53.12 in the case of the Morris child; in 1934 Woodland was billed by Bates City for the sum of $11.10--being 2/3 of a year for the Morris child. The Boslee children at the end of 1936 were charged with having attended 1/5 of a year in 1936 and billed at $5.90 each. The figures upon which they base their contention are appended for your information.

"The question resulting in a refusal of Woodland District to pay Bates City is as to the legality of Section 16A of the 1935 School Laws, which require schools to pay tuition to districts affording high school facilities. Some confusion has arisen in the mind of the Woodland district over the decision rendered in State ex rel Burnett vs School District of City of Jefferson, SW (2nd) 74, page 30. It is the contention of the Woodland people that they owe nothing to Bates City, and what Woodland School Board wishes is your opinion as to the constitutionality and legality of the statutes requiring them to pay this charge."

Section 16, Laws of Missouri, 1935, is the statute which relates to the payment of tuition by resident boards of directors on those pupils attending high schools in another district. Section 16 was first enacted in 1931, Laws of Missouri, 1931, page 343, and was amended in 1933, Laws of Missouri, 1933, page 393, and amended in 1935, Laws of Missouri, 1935, page 351.

Section 16, as now appearing in the 1935 Laws, reads as follows:

"The board of directors of each and every school district in this state that does

not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance of such pupils shall not be counted in determining the teaching units of the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental purposes. Incase of any disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final. Subject to t e limitations in this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil, nor shall any school be denied the right to collect tuition from a pupil, parent, or guardian, if the same is not

> paid in full as herein before provided. In no case, however, shall the amount collected from a pupil, parent, or guardian exceed the difference between fifty dollars and the per-pupil amount actually paid by the state, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per-pupil cost of maintaining the school attended is greater than fifty dollars. If, for any year, the amount collected from a pupil, parent or guardian exceeds the difference between fifty dollars and the per-pupil amount actually paid by the state, the excess shall be refunded as soon as the fact of an overcharge is ascertained."

You will note that said section specifically provides that "The board of directors of each and every high school district in this state that does not maintain an approved high school * * * * * shall pay the tutition of each and every pupil resident therein who * * * * * attends an approved high school in another district * * *."

While said section specifically provides for the board of directors to pay the tuition, yet, the amount of tuition the district shall pay is based upon the per-pupil cost of maintaining the school in which the pupils attend "less a deduction at the rate of fifty dollars for the entire term." In other words, the board of directors pays the tuition which is calculated and based upon the per-pupil cost, less $50. To illustrate: If the per-pupil cost of a school district which the pupil attends, amounts to $75 for the entire term, the district of residence would have to pay $25 of said $75.

The case of State ex rel. Burnett v. School District of City of Jefferson, 74 S. W. (2d) 30, specifically pointed out that Section 16 was complete and exclusive as to the payment of tuition. We quote (l. c. 33-34):

> "Now, although section 16 contains no express provision that a nonresident

pupil shall not be required to pay tuition, it does provide a complete and apparently exclusive scheme for its payment. First, it unequivocally requires the district of residence to (italics ours) 'pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered.' Second, it expressly limits the amount of tuition by providing that (italics ours) 'the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year; * * * and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. * * * * * * * * * * * * * * * * * A complete scheme for the payment of the tuition of nonresident pupils thus having been provided, we cannot escape the conclusion that it was intended to be exclusive and that respondents are without power to charge tuition in any other way. With respect to payment of tuition of nonresident pupils, the provisions of old section 9207 and section 16 of the new law are inconsistent, and the later enactment must prevail."

In the Burnett case the Supreme Court, en banc, called attention to the fact that the $50 to be paid by the State was in reality an aid to the sending district and not

the receiving district; having the following to say (p. 34):

> "It is now conceded by all parties hereto that the provision in Section 16 for payment by the State of $50 tuition per nonresident attending pupil is in reality state aid to the sending district and not to the receiving district."

Bearing in mind that the district of residence must pay the tuition of its pupils attending high schools in other districts, and that the rate of tuition is based upon the per-pupil cost of the school attended, less a deduction at the rate of $50, and that the $50 the State pays is an aid to said resident (sending) district, it is our opinion that the Woodland School Board would have to pay to Bates City Consolidated School District, tuition of each of its pupils so attending Bates City Consolidated School District, but the amount to be paid would only be that over and above $50. The specific amounts that would be owing would be a question of fact to be ascertained, namely, by calculating the per-pupil cost, and then deducting $50. The excess over the $50 would be the amount due and owing.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

JURIES: Federal employes exempt from jury service when?

5/26

May 23, 1936.

FILED
65

Honorable Bert R. Mullen
State Administrator, ECW
617 Broadway
Columbia, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated May 18, 1936, which reads as follows:

> "You may recall the writer talking to you relative to Government Employees, working in the CCC Camps of the State, serving on regular juries. It so happens that we have about one hundred seventy-five (175) men who are now on Civil Service status, and who are working in various CCC Camps over the State. These men are as a rule some distance from their homes, and occasionally one of them will receive a summons to appear at his home town as a juror. I should like an opinion from your office as to whether or not Civil Service Employees, on the above work status, are exempt from jury duty."

Section 8746 R. S. Mo. 1929, provides the general qualifications of jurors and reads:

> "Every juror, grand and petit, shall be a male citizen of the state, resident of the county, sober and intelligent, of good reputation, over twenty-one years of age and otherwise qualified."

It is elementary law that the qualifications and exemptions of jurors are a matter of legislative control. In State v.France, 76 Mo. 681, l. c. 682, the Supreme Court said:

> "An objection was also made to W. B. Fortune and John V. Burgess, who had been summoned as petit jurors, on the ground that they had not resided in the State and county one year. Upon the voir dire examination of these persons touching their qualifications as jurors, it appeared that one of them had lived in the State and county of St. Clair about two months, and the other about five months, and that both of them had settled there with the intention of making their permanent homes in the county and State. This was all that is required by section 2777, Revised Statutes, which provides 'that every juror, grand or petit, shall be a male citizen of the State and resident of the county, sober and intelligent, of good reputation, over twenty-one years of age, and otherwise qualified.' "

Temporary absence from one's resident of one otherwise qualified as a juror does not disqualify one duly summoned as a juror. In State v.Burns, 148 Mo. 167, l. c. 174; 49 S. W. 1005, our Supreme Court said:

> "Equally groundless is the point that one of the panel of jurors was not a resident of the county. The testimony largely preponderated that he was a citizen of Scott county, had resided at Vanduser, had voted at the spring election in said county, and had expressed his intention to vote that fall at the general election in said county; that he was an old resident of the State."

The summons to appear for jury service is a prerequisite of the duty to serve. One not duly notified by statutory summons is not duly bound to appear, for without service of summons, as provided by law, one can not be bound to perform the duty of appearing to serve on a jury when he has no notice of his duty.

The statutory summons provided by law is set out in Section 8758, R.S. Mo. 1929, and reads:

> "The names of the persons so drawn shall be recorded by the county clerk in the records of the county court, and he shall as soon thereafter as practicable deliver to the clerk of the court for which such jury is drawn a certificate thereof, who shall record the same in a book to be provided for that purpose. And the clerk of the court for which the jury is drawn shall immediately thereafter issue a summons to the sheriff of the county, directing him to summon the persons thus drawn as petit jurors to appear on such day of the term of such court as shall be named in such summons by the clerk of said court to serve as petit jurors; and it shall be the duty of the sheriff to make service of such process at least ten days before the first day of the term of court for which such persons are drawn, which summons shall be served by reading the same to the person so summoned or by leaving a copy of the summons at his usual place of abode with some member of the family over fifteen years of age, except in such cases as may be hereafter provided."

Certain persons who are otherwise qualified under the general provisions of the statutes may be exempt from jury service where the Legislature so provides. In Missouri there are exemptions provided for by statute.

Section 8748, 8803, 8818 R.S. Mo. 1929, and Laws of Missouri, 1931, p. 247, Sec. 10, all provide exemptions from jury service to persons who fall within a given group.

None of the provisions of exemption in sections 8748 and 8803, R.S. Mo. 1929, can be construed to include government employees in CCC camps with civil service standing.

Section 8818, R.S. Mo. 1929, relates only to juries in cities with over one hundred thousand inhabitants, and exempts from jury duty any person "who holds any office of profit or employment created by or authorized under the law of the United States, or of the State of Missouri, or the ordinances of the city."

Laws of Missouri 1931, p. 247 relates only to juries in cities containing over five hundred thousand inhabitants and exempts from jury duty any person "who holds any office of profit or employment created by or authorized under the laws of the United States, or of the State of Missouri, or the ordinances of such city."

CONCLUSION.

This department is of the opinion that one, otherwise qualified as a juror, who is employed by the United States Government and working in the CCC camps of this State, is duly served with a summons to appear at his place of residence as a juror, is bound to appear for service unless he resides in a city of one hundred thousand or five hundred thousand inhabitants, in which case he is not bound to appear for jury service, as he is exempt from such service under the statutes.

This statutory exemption is not a disqualification but is a personal privilege which the juror may claim, or he may waive. To claim this privilege he has but to notify the Court, which issued the summons, that he is claiming his statutory exemption by reason of his employment by the United States Government.

A qualified person who is duly summoned as a juror, and who is not exempt from service by legislative enactment must appear for service as provided in the summons, or for his failure to appear he may be held in contempt of Court.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

INHERITANCE TAX: Taxability of (a) life insurance; (b) Insurance trusts; (c) annuity contracts.

1-8

January 6, 1936.

FILED
66

Honorable Richard R. Macy,
State Treasurer,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion respecting the taxation of the proceeds of insurance contracts under the inheritance tax laws of Missouri. In order to better present our discussion of this rather broad subject, we have subdivided the opinion into three classes, i.e., life insurance generally, insurance trusts and annuity contracts.

Life Insurance, Annuity Insurance and Insurance Trusts

A comprehensive discussion of the above types of insurance contracts is impossible within the limited space of this opinion. However, it is necessary, for the purpose of deciding whether or not the proceeds of these contracts are subject to the inheritance tax laws of the State of Missouri, that some regard be given here as to the fundamental character of these contracts.

Life insurance may be simply defined as a contract dependent upon human life whereby one, for a stipulated consideration, usually called a premium, agrees to pay another a sum certain upon the happening of a given event or contingency, usually death, or upon the termination of a specified period. Judge Napton, in the early case of State ex rel. Attorney General v. Merchants Exchange Mutual Benevolent Society, 72 Mo. 146, places the judicial stamp of approval upon the definition as given by Buynon, who defined "life insurance" to be "that in which one party agrees to pay a given sum upon the happening of a particular event consequent upon the duration of human life in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another."

Couch, in his Cyclopedia of Insurance Law, regards annuity insurance as a contract to pay the insured, or a named person or persons, a sum or sums periodically during life or for a certain period. It may be said that an annuity is generally

understood to be an agreement to pay a specified sum to the annuitant annually during life, or in fixed installments at stated intervals during a definite period. Fidelity Invest. Asso. v. Emmerson, 318 Ill. 548.

An insurance trust, generally speaking, is an agreement between a person and a trustee, usually a trust company, whereby the trustee agrees to collect and hold the proceeds of life insurance policies for the benefit of certain beneficiaries either named in the trust agreement or in the will of the insured. These trusts take two forms - funded and unfunded. Couch defines these two classes as follows:

> "A funded life insurance policy may be said to be a trust established with life insurance policies, plus investments, or funds paid into the trust yielding income sufficient to enable the trustee to pay the premiums on the policies; and an unfunded life insurance trust is a trust established with life policies, the premiums of which are paid by the insured."

Ordinary Life Insurance Payable to a Named Beneficiary

While in a few of the states life insurance is expressly made subject to the succession taxes, in the majority (which class embraces Missouri) there is no statutory mention made of insurance. In these states the courts that have passed on the question have uniformly held that life insurance payable to a designated beneficiary was not subject to the inheritance tax laws upon the theory that the property received by the beneficiary is by reason of the contract with the insurance company and not by reason of having been a part of the decedent's estate.

This theory of law is clearly set forth by Rugg, C.J., in the leading case of Tyler v. Treasurer and Receiver General, 226 Mass. 306, wherein he says:

> "The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence

> until after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay to the beneficiary. So far as the insured is a 'grantor', to use the word of the statute, the only thing which he grants or can grant is an interest in a contract. So far as he can make a 'gift', the only thing which he has to give is a right in a contract. By designating a beneficiary both the 'grant' and the 'gift', so far as either exist at all, take effect in enjoyment and possession at once. Such a relation does not by fair intendment come within the descriptive words of the statute as 'property.....which shall pass....by....gift..... made or intended to take effect in possession or enjoyment after the death of the grantor."
>
> See also Bullen's Estate, 143 Wis. 512."

Ordinary Insurance Payable To Decedent's Estate

Insurance policies payable to the estate of a decedent are subject to the inheritance tax laws of this state, that is to say, the proceeds of these policies are subject to the tax. Appeal of Silberman (Sup. Ct. of Errors of Conn.), 134 A. 778. This distinction (that between the policies and the proceeds therefrom) was not observed by the Court of Appeals of New York in the leading case sustaining the taxation of this type of insurance (Matter of Knoedler, 140 N.Y. 377). In that case the Court said:

> "All property which the decedent owned when he died, and which has an appraisable value is to be included, subject, of course, to the payment of debts and to such exceptions as are specifically

> mentioned, but which have no application here. If these policies were not assets, then the appellants derived no title to their proceeds under the will, and they cannot make title through any other source. It is only such property as the testator died seized and possessed of and its increase that they can claim as his legatees. If, when the appellants applied for their share of the estate under the will, the administrator had withheld the moneys collected upon the insurance policies on the ground that they did not pass by the will, his position would have appeared to have been quite as reasonable and tenable as that advanced by the appellant's to resist the collection of this tax."

The proceeds of these policies having been paid to the estate of the decedent, the devolution is controlled either by the will, if one there be, or by the intestate laws of this state. Manifestly, then, the proceeds are within the scope of Section 570, Laws of Missouri, 1931, page 130, wherein it is provided:

> "When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state."

It has been held by the Supreme Court of the United States (Chase National Bank v. United States, 278 U.S. 327) that the mere reservation of the power to change the beneficiary in a life insurance policy was sufficient to bring the proceeds within the terms of the Federal Estate Tax.

> "And we see no necessity to debate the question whether the policies themselves were so transferred, for we think the power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the

> donor's bestowal of benefits on another at death, or of the particular methods by which his purpose is affected, so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control at the time of death insures to the benefit of him who owns the property subject to the power, and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax."

However, it must be remembered that the Supreme Court in the above case was construing a statute specifically providing for the taxation of life insurance payable to designated beneficiaries in excess of the sum of $40,000. In view of the fact that our statute does not so provide, we do not feel bound by the interpretation of the Supreme Court nor can we subscribe to the theory of law announced therein.

We have said in this opinion that the proceeds of life insurance policies payable to designated beneficiaries were not subject to the inheritance tax law of Missouri. The reserved right to change the beneficiary does not, to our mind, affect the fundamental relationship of the parties to the contract. As to this point, we submit the reasoning of the Supreme Judicial Court of Massachusetts in the case of Tyler v. Treasurer, 226 Mass. 306, 115 N.E. 300, as the correct analysis of the problem:

> "The rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. They are in no wise modified or increased at the time of the death of the insured.
>
> "The contract of life insurance differs from most other contracts in that it is not intended ordinarily

for the benefit of the insured but of some dependent. Its original and fundamental conception is a provision by small periodical contributions to secure a benefit for the family. While this conception has been enlarged in some respects and especially in its commercial aspects, still the basic elements continue and are found in all the cases at bar. The insured retains no ownership of that which has passed to the beneficiary under the contract. A reserved right to change the beneficiary does not affect the essential nature of the rights of the beneficiary so long as they last. * * * The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence until after his death. Even then the money belongs to the insurer who is charged with the duty to pay the beneficiary under the contract. So far as he can make a 'gift' the only thing which he has to give is a right in a contract. By designating the beneficiary both the grant and the gift, so far as they exist at all, take effect in enjoyment and possession at once. Such a relation does not by fair intendment come within the descriptive words of the statute as 'property which shall pass by gift made or intended to take effect in possession or enjoyment after the death of the grantor.' The conclusion is that the sums received by the beneficiaries in accordance with the designations made in the contract of insurance are not subject to the succession tax."

And in the recent case of In Re Killien's Estate (Sup. Ct. Wash.) 35 P. (2d) 11, the Court said (l.c. 19):

> "Therefore, as life insurance is a contract made by one person for the benefit of another, in which contract the death of the insured is not a factor except as fixing the time for performance by the insurance company, and as the right to make the contract and the right to fix the time for performance do not depend upon permission from the state, the contract of insurance, where the proceeds thereof are payable to a designated beneficiary, is not subject to the inheritance tax. The reservation of the right to change the beneficiary of a policy of insurance does not render the proceeds of the policy subject to an inheritance tax."

There is but one exception to the above rule, i.e., where there has been an assignment of the policy or policies in contemplation of death. This is a difficult question, differing in every instance by reason of the facts involved in each particular case. However, it would seem that if the assured actually assigned a policy of insurance in contemplation of death so the proceeds would be payable to a designated beneficiary and not to his estate, the proceeds thereof should be subject to tax.

> "In the present case, however, the decedent by the assignments to his son-in-law transferred interests or claims of value which, in my opinion, were made 'in contemplation of death' and are taxable." In Re Einstein's Estate, 186 N.Y.S. 931.

This does not, in our opinion, conflict with our theory of the law respecting the reserved right to change the beneficiary inasmuch as, in the above instance, the proceeds of the insurance policies pass to the ultimate beneficiary, not by reason of the contract with the insurance company, but by reason of the assignment from the decedent.

> "Accordingly, an insured may assign a life insurance policy

> which is payable to his 'legal representatives' * * * and to this even though the assignee has no insurable interest and the assent of the insurer has not been obtained." Couch, Cyclopedia of Insurance Law.

Life Insurance Trusts

We have in the preliminary subdivision of this opinion called attention to the fundamental nature of insurance trusts. However, for the purpose of taxation, the distinction between funded and unfunded trusts is of little moment in that, in both types, the trustee receives the proceeds by reason of the contract with the insurance companies.

Perhaps the most common form of these trusts is the unfunded trust, that is, the assured pays the premium on the policies, the proceeds of which, upon the death of the assured, are paid by the insurance company to a trustee. The trustee then distributes the funds according to the terms of the trust instrument entered into between the trustee and the decedent.

The leading case considering the taxation of a life insurance trust is the case of In Re Vorhees' Estate, 193 N.Y.S. 168. In that case the Court said:

> "The intent of the assured with respect to these policies seems plain; he acquired the several policies and assigned them to provide a trust fund for the benefit of his wife, his son, and others after his death; and by the trust deeds he directed how, under what conditions, when, and to whom payments therefrom should be made after his death. By his plan he was not distributing after death property valuable to him or his estate. Unless he made the contracts with the insurance companies, and paid the premiums, there would be no sums coming in therefrom, and, having made the contracts, except in the event of a default in payment of the premiums, the contracts of insurance would be

of little value to him or his estate. If he failed to pay the premiums on the ten-year renewable term policies, they would lapse, and on the four straight life policies there is but a small paid-up value. He has, indeed, by his trust deeds, directed how the proceeds of these policies shall be distributed after death, and named the conditions under which the beneficiaries should take. But this is the effect in principle of every life policy payable at death to another than the assured or his estate.

"Considering the nature of the property, we do not consider that the plan of the assured should be held to be of a testamentary character.

* * *

"We conclude, therefore, that the assured assigned and delivered these policies before death; that the transfers of the policies and their proceeds were not made in contemplation of death, nor made to take effect in possession or enjoyment upon death only, within the meaning of the statute; that the proceeds of the policies under the assignments thereof came rightfully into the hands of the Provident Life & Trust Company of Philadelphia; that they never became the property of the estate of the deceased; and that there has not been and cannot be a transfer of the proceeds of the policies under the will of the deceased or the intestate laws of the state."

In the case of In Re Headrich's Estate, 236 N.Y.S.395, the Court passed upon the question wherein an independent trust company was named as trustee. The Court said:

> "It is the contention of the appellant that where the policy is payable either in a limited sum or in installments to the beneficiaries, they would not be taxable, but that the additional, possibly more beneficial, step makes them subject to the tax. With this contention this court cannot agree. Under such a trust arrangement the trust beneficiaries are as truly the equitable owners of the proceeds as if they had been named as beneficiaries therein. The trustee has a mere legal title and in equity the substance rather than the form of the transaction is of transcendent importance. "

See also, In Re Marshall's Estate (Sup. Ct. Minn) 228 N. W. 920.

The case of Fagan v. Bugbee (decided by the Supreme Court of New Jersey) 143 Atl. 807 is interesting for its conflict in theory with the cases heretofore cited. In holding the proceeds of insurance policies taxable where payable to a trustee for designated beneficiaries, the Court said (l. c. 809):

> "The beneficiaries in the present case take by deed of trust and not by contract of insurance. It is the nature of the vehicle which conveys the right of the property and not the nature of the property itself which determines the taxability of the transfer; hence, we conclude the tax was properly levied."

The conclusion of the court is surprising when considered in the light of the review of the fundamentals made by the Court. In the course of the opinion, the Court recognizes that the trustee acquired merely a bare legal title to the funds and that the beneficial title was in the widow and three children of the deceased. It is fundamental in equity that the substance and not the form governs, and we confess we can see no logic or reason supporting the taxation of proceeds of insurance policies when payable to

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trustees for the benefit of beneficiaries and yet exempt from tax the proceeds of policies payable direct to certain beneficiaries. The appointment of the trustee, as is pointed out in the Haedrich Case, is merely a protective incident and does not affect the fundamental character of the transfer. We cannot, therefore, adhere to the ruling of the New Jersey Court, and respectfully submit that conclusions arrived at by the New York Courts provide the correct rules of law applicable to this question.

However, if the deed of trust names no beneficiaries and it is therein provided that the trustees pay over the income and principal consisting of the proceeds of life insurance policies in accordance with the provisions set forth in the settlor's will, then it would appear that the property passes to the beneficiaries, not by reason of the trust agreement, but by reason of the will, and therefore is subject to the Missouri succession tax.

This concept of inheritance tax law is clearly stated by the Supreme Court of Pennsylvania in the case of In Re Myers' Estate, 164 A. 611. In that case the deed of trust recited that it was made for the purpose of settling and securing the proceeds of the policies and provides that the trustees shall pay over the income therefrom and the principal in accordance with the provisions set forth in the settlor's will. The Court, in holding the proceeds subject to tax, said:

> "In the instant case, the settlor retained complete title and control. No other interest than his, vested or contingent, arose until his death. The deed of trust accomplished nothing in respect to disposition of the proceeds of the policies. This failure resulted, not from any fortuitous events over which the settlor had no control, but from the clear intent of the language of the deed itself, and of the testator's will. The deed created no interest; it named no beneficiaries. It was incomplete and meaningless. It transferred no property to any one; it divested the settlor of no beneficial interest whatever. Distribution of the principal was expressly made dependent on the terms of testator's will; nothing could pass to beneficiaries except in that manner. It was not even necessary for him to amend

or revoke the trust or any part of it in order to control its ultimate disposition. He could do that by his will."

A transfer of property in this manner presents a clear and unmistakable attempt to evade the succession laws of Missouri. While it is proper and correct to, by watchfulness and care, avoid taxes, evasion cannot be condoned.

Annuity Contracts by Insurance Companies.

There are a great number of insurance annuity contracts issued by insurance companies, the provisions of which are many and varied. It would be quite impossible to render a blanket opinion covering all of these contracts; therefore, we shall, for the purpose of this opinion, limit ourselves to a discussion of that type of contract wherein the "assured" retains the right to revoke the contract and have the single premium repaid to him by the companies.

This form of contract has recently been construed by the Supreme Court of Minnesota. (State ex rel. Thornton v. Probate Court, 186 Minn. 351) In that case, each of three life insurance companies authorized to do business in this state issued, during the first part of 1931, so-called annuity policies or contracts to Joseph M. Thornton, who thereafter died testate on July 1, 1931. At the time these contracts were issued Thornton paid to each company the sum of $30,000. No future payments or premiums were required. None of the contracts contemplated any segregation of assets applicable to or securing the payments to be made under the contracts, but the above named sums paid by Thornton became the absolute property of the company receiving the same. Each company agreed to pay Thornton annually a specified sum, beginning with the year 1932. The sum so agreed to be paid each year was $900 by one company, $1,050 by another, and $980 by the third. Besides these annuities, the companies agreed that during Thornton's lifetime there would be guaranteed earnings on the sums paid in equal to three and one-half per cent, and that he would be paid such additional amount as might be allocated to him by the board of directors of each company out of interest earnings in excess of three and one-half per cent. The Court, in holding the proceeds of these contracts subject to the succession tax of Minnesota, said:

"The policy contracts here involved are not what are ordinarily known as annuity contracts in which a definite annual sum is to be paid the annuitant during his life or the life of some other person named in the contract, and in which such annual payments absorb portions of the principal. The annual rate of interest earned by the companies upon their total investments exceeded five per cent up to the time these contracts were issued, and it seemed probable that the annuities to be paid under this type of contracts would exceed five per cent in the future. Except in what is known as business insurance, the right to change beneficiaries is common to all life insurance; and so is the right to cancel the contract and receive the full cash surrender value thereof; also the right to borrow on and hypothecate the contract or policy. The amount paid the beneficiaries was $94,712.99. There were here no annuity payments, for Thornton died before the year in which such were to be paid; and under the contracts the beneficiaries, in addition to the $30,000, were entitled to receive a sum equal to the single premium paid less annuity payments. If the insured died before the time of making the first payment each company agreed to pay to the beneficiaries the total amount of the premium paid; and each company assumed the risk of the small earnings and depreciation and loss on its investment, the result of which might be that the company would be required to make, during Thornton's lifetime, a larger annual payment than it earned, and upon Thornton's death, pay to the beneficiaries an amount in excess of the benefits accruing to it from the premium paid. The contracts are made part of the stipulation. These are very lengthy and need not be noted except as to provisions deemed important to determine the question for decision. Among these are that the $30,000 Thornton paid to each company

it agreed to repay to him at any time during his lifetime upon 90 days' notice. He also reserved the right to change beneficiaries. No physical examination seems to be required of the one who pays the consideration for such contracts.

* * *

"But our inheritance or succession tax statute as it now stands does not in terms cover ordinary life insurance.

"Although the contracts here in question have features in common with ordinary life insurance policies, their true effect and scope are vastly different. It cannot well be denied that the $90,000 Thornton paid to these companies remained virtually at his disposal, use, and control as long as he lived and passed at his death to the beneficiaries he named. True, the money he paid became the property of the companies, but they guaranteed to him a certain percentage of earnings thereon each year and agreed to pay him specified annuities each year, together with such dividends as might be earned and allocated to the fund his $90,000 helped to create. As long as he lived he had the right, upon notice, to have $90,000 returned. It seems to us this $90,000, under these contracts, stands precisely in the same relation to him as if he had deposited that amount in a bank under a contract similar to one of these. There would be an obligation to pay the whole sum paid or deposited to him, if demanded in his lifetime, and to appointed beneficiaries upon his death. This obligation was an estate or property right of his to which the beneficiaries named succeeded at his death, and is subject to the tax.

"An examination of the various provisions of the contracts before us

> strongly suggests that the reason for their coming into existence was the desire to evade the expense of probating estates and the burden of the succession tax. Quite a saving can be made in this manner if a person is in position to convert his estate into cash and pay it all to a responsible corporation upon its agreement to pay a stipulated annuity each year during life and certain dividends, or to pay back the whole amount paid in whenever desired. The law will look behind the name of contracts--these so-called insurance policies--and ascertain their scope and purpose to determine whether or not they come within the operation of the succession tax."

CONCLUSION

In view of the foregoing, we respectfully submit the following conclusions:

(a) The proceeds of insurance policies payable to the estate of a decedent are subject to tax.

(b) The proceeds of insurance policies payable to named beneficiaries are not subject to tax, except where policies are assigned in contemplation of death.

(c) The proceeds of insurance policies passing to named beneficiaries through the medium of trust agreements are not subject to tax except in those cases wherein the provisions of the will provide for the trust.

(d) The proceeds of single premium insurance contracts wherein the right to have the premium returned at any time is retained by the "assured" are subject to tax.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

INHERITANCE TAX: Intangible property, including stocks, bonds, notes etc., physically located in the State of Missouri and owned by a foreign subject or by a non-resident domiciled in a foreign country, is subject to the inheritance tax laws of the State of Mo.

3-2

February 27, 1936.

FILED
66

Neuhoff & Millar,
Attorneys at Law,
414 Rialto Building,
220 N. Fourth Street,
St. Louis, Missouri.

Attention: Mr. David L. Millar

Dear Mr. Millar:

This department is in receipt of your letter of February 4, 1936 requesting an opinion as to the following state of facts:

> "A client of our office has sought our advice on the following situation:
>
> "A German citizen, who had come to this country and was employed here, became a naturalized citizen of the United States, and then subsequently returned some years ago to Germany and thereafter resumed her German citizenship, left with this St. Louis resident approximately $10,000 worth of intangible securities for safe-keeping, fearing the inflationary period in Germany. These securities have had their situs during this period in St. Louis, the local resident having simply held them for safe keeping and turned over, when requested, once a year, the proceeds of the coupons. The non-resident German citizen, owner of these securities, has died. The local resident having them in charge, desires to forward them to the decedent's estate in Germany. The local resident, being a client of our office, has asked us whether there is any Missouri inheritance tax due, before forwarding the securities.
>
> "In view of the decision of the Supreme Court of the United States in the case of

Baldwin vs. Missouri, 281 U.S. 586, and the subsequent decision by the same Court of the First National Bank of Boston vs. Maine, 284 U.S. 312, both of which you are undoubtedly familiar with, it appears to us that these securities, being all intangibles and owned by a non-resident decedent and not having acquired a business situs within the State, there would be no Missouri inheritance tax due on them. In the two above mentioned cases the non-resident decedent was domiciled in another state, while in the case presented to us the non-resident decedent was an alien, domiciled without the United States. Under the reasoning of the Court, however, it would appear that that factor was not material.

"We would appreciate it if you would let us know whether it would be in accord with the views of your Department on this subject, if we may advise this client that there is no Missouri inheritance tax due on this intangible personal property, and that the same may be forwarded to the decedent's estate in Germany.

"We were unable to find any precedent in Missouri on this subject."

I

Ordinarily, intangible property is subject to taxation only by the state of the domicile of the owner thereof.

Under the earlier decisions, it was held to be constitutional for a State to subject the intangible property of a non-resident to the succession or inheritance tax imposed by the State--that is, the State wherein the physical presence of the bonds, stocks, etc. was located could impose an inheritance tax on the succession of the property regardless of the domicile of the owner. The Supreme Court of the United States, however, has finally, and, we trust, for all time, settled the various theories with respect to this question,(with the possible exception of intangible property that has acquired a "business situs" in the state where physically located) in the cases recently decided, namely, the cases of

Baldwin v. Missouri, 281 U.S. 586, and First National Bank of Boston v. Maine, 284 U.S. 312. In the Baldwin case, the Court said:

> "The bonds and notes, although physically within Missouri, under our former opinions were choses in action with situs at the domicile of the creditor. At that point they too passed from the dead to the living and there this transfer was actually taxed. As they were not within Missouri for taxation purposes the transfer was not subject to her power. Rhode Island Trust Co. v. Doughton, 270 U.S. 69."

And, in the First National Bank Case, the Court, in reviewing its former decisions, held:

> "It has long been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes, and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment."

In view of these decisions, double or multiple taxation by the respective states of intangible personal property transferred at death is prohibited by the Fourteenth Amendment to the Constitution of the United States.

II

Intangible property owned by a non-resident of the United States and physically present in the State of Missouri is subject to the Missouri inheritance tax.

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It must be remembered that the cases of the United States Supreme Court referred to in Section I of this opinion have only to do with the power and relation of a state with every other state in the Federal Union; therefore, it would seem that the constitutional rules laid down by those decisions would not be applicable to non-residents of the United States.

In a very recent decision of the United States Supreme Court (Burnett v. Brooks, 288 U.S. 378) that Court considered the taxability of intangible property physically present within the United States and owned by a British subject who was a resident of Cuba. It was argued in that case that the principles of mobilia sequuntur personam should be applied, and that since the deceased was a resident of Cuba, the intangible property should be regarded as situated in Cuba. The Court stated, however, that "Congress did not enact a maxim" and that this maxim is a mere fiction which must yield to the facts, and that intangible property may acquire a situs other than the domicile of the owner.

The recent decisions of the Supreme Court referred to in Section I of this opinion were relied upon in that case. In holding these decisions not applicable to the matter under consideration, the Court said:

> "The argument is specious but it ignores an established distinction. Due process requires that the limits of jurisdiction shall not be transgressed. That requirement leaves the limits of jurisdiction to be extended in each case with appropriate regard to the distinct spheres of activity of the state and nation. The limitations of state power are defined in the view of the relation of the states to each other in the Federal Union. The bond of the Constitution qualifies their jurisdiction which is the principle which underlies the decisions cited by respondents. These decisions established that proper regard for the relation of the state in our system required that the property under consideration should be taxed in only one state and that jurisdiction to tax was restricted accordingly."

The Court then concluded that the securities in question should be included in the gross estate of the decedent.

If there is no constitutional limitation preventing the Federal Government from exercising its sovereignty in the taxation of intangibles physically located in the United States and owned by non-residents, it would seem that there should not be any constitutional barrier preventing a state in its sovereignty from similarly taxing intangibles having a situs within its borders owned by a citizen of a foreign country or by a non-resident of the United States.

This specific question was recently before the Supreme Court of California in the case of In Re McCreery's Estate, 29 Pac. (2d) 186, wherein it was held that the state could impose an inheritance tax on a transfer by Will of stock in a domestic corporation owned by a decedent who was a non-resident of the United States, providing the stock certificates were physically present in the state. Specifically, the Court said (l.c. 187):

> "It is not disputed that under subdivision 2 of section 2 of said Inheritance Tax Act, it was the legislative intent to impose a tax upon the transfer here disclosed. This section requires the payment of a succession tax,

> 'When the transfer is by will or intestate laws of property within this state and the decedent was a nonresident of the state at the time of his death * * *.'

It might be well to note at this point that Section 570, Laws of Missouri, 1931, p. 130 contains a clause substantially similar to that contained in the Inheritance Tax Act of California. Section 570 provides in part as follows:

> "When the transfer is by will or intestate law of property within the state or within the jurisdiction of the state and decedent was a non-resident of the state at the time of his death."

The Supreme Court of California in discussing the fiction of mobilia sequuntur personam, said (l.c. 188):

> "But this restriction has as yet been applied only to estates of decedents who were residents within the United States. Farmers' Loan Co. v. Minnesota, 280 U.S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A.L.R. 1000; First National Bank v. Maine, 284 U.S. 312, 52 S. Ct. 174, 76 L. Ed. 313, 77 A.L.R. 1401. The rule which selects the domicile, as distinguished from the situs of the intangibles, was and is largely one of logic and convenience. But the reasons assigned for this selection all fail where the decedent was domiciled without the United States. It by no means seems certain that a valid rule could not have been promulgated which fixed the constructive situs of the intangibles as the place of taxation instead of the domicile of the owner. Moreover, the above-cited holding does not specifically purport to fix the rule controlling the jurisdiction for taxation where the owner of the intangibles was domiciled without the United States, whether he was a citizen of the

> United States or a citizen of a foreign nation. Intangible property in one of the states of a nonresident of the United States receives the protection of our laws. Why may not the privilege of receiving it by transfer or succession be taxed by some state at least of the United States? And if it may be so taxed, why may not such tax be assessed in the state of the actual or constructive situs of such property?"

The Court then referred to the case of Burnett v. Brooks, previously referred to in this opinion, and concluded (l.c. 188):

> "Applying this reasoning to the case before us (stock in a domestic corporation), why may not the State of California tax the transfer of the property of a nonresident of the United States, which property has its actual or constructive situs within the jurisdiction of this state? To so hold, we encounter no question of the proper distribution of power between the states as the rights of no other state are involved. The question is: Has a state the power to tax the transfer of property within its boundaries, belonging to persons who were domiciled without the United States? The logic of the Burnett Case, supra, seems to justify the right of the State of California to tax such a transfer."

CONCLUSION

The power to tax is a sovereign function and one of the most jealously guarded of all sovereign powers. Since it is our conclusion that the Fourteenth Amendment to the Constitution of the United States is not applicable (in the problem here before us) to foreign subjects or to non-residents of the United States domiciled in a foreign country, it is the opinion of this department that intangible property physically located in the State of Missouri and owned by a subject of a foreign country or by a non-

resident domiciled in a foreign country is subject to the inheritance tax laws of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

OLD AGE ASSISTANCE: 5% grant from Federal Government under Sec. 3a of Federal Act may be applied for administration expenses in the same proportion as funds applied in State Appropriation Act.

3-4

March 4, 1936.

FILED
66

Hon. Richard R. Nacy,
State Treasurer,
Jefferson City, Mo.

Attention: Mr. H.S. Johnson

Dear Sir:

This department is in receipt of your letter of February 26, requesting an opinion as to the following:

> "I am in receipt of a check from the Treasury of the United States, dated February 14, 1936, in the sum of $315,000.00, object for which drawn #1119774 Social Sec. BD.
>
> "The assumption is that the above check is for the Old Age Assistance, and I desire your official opinion as to just how this $315,000.00 should be handled by this department. "

Section 3a of the Federal Act providing for grants to states for Old Age Assistance provides in part as follows:

> " * * * and (2) five per centum of such amount which shall be used for paying the costs of administering the state plan or for old age assistance, or both, and for no other purpose."

It is our understanding that the fund recently received from the Treasurer of the United States represents a grant of $300,000.00 for old age assistance plus 5% of that amount, or $15,000.00 to be used as provided in Section 3a, as set out above.

If this be correct, the $15,000 in question may be used either for administration purposes or for old age assistance, or both.

Section 46-H, Laws of Missouri, 1935, p. 178, making appropriation for administration of the Missouri Old Age Assistance Act appropriates $230,000, to be divided as follows:

A. Personal Service.....$85,000.00
B. Additions.....10,000.00
C. Operations.....135,000.00"

Section 46-H-1, Laws of Missouri, 1935, p. 179 provides:

> "There is hereby appropriated out of the State Treasury, chargeable to any funds paid into the State Treasury by the Board of Managers of the Eleemosynary Institutions, known as the State Board, out of any federal contributions and allotments, for the purposes set forth in Section 46-H, of this act, and in addition to appropriations made by Section 46-H of this act, the sum of One Hundred and Twenty-five Thousand Dollars ($125,000.00), or so much thereof as may be necessary, for the purposes set forth in Section 46-H, and the said amount shall be applied to the purposes and in apportionment as funds appropriated by said Section 46-H are applied; during the years 1935 and 1936."

By reason of this section of our laws, if the Board of Managers of the Eleemosynary Institutions determine to use the 5% heretofore referred to for administration purposes, said 5% must be used in apportionment as the funds appropriated by Section 46-H are applied. In other words 85/230 of said funds may be used for personal service, 10/230 may be used for additions and 135/230 may be used for operations.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

COLLECTORS: Allowance for deputy hire cannot be retained by collector

August 27, 1936

FILED 66



Hon. Norman S. Newkirk
Collector of Revenue
Warsaw, Missouri

Dear Sir:

We have your request of August 18, 1936, for an opinion reading as follows:

> "I would like to know your opinion concerning Section 9935a, Page 406, Laws of 1935, relating to "Amount of fees to be retained for deputy and clerical hire.", by county collectors.
>
> Some have told me that in order to withhold and retain the twenty-five per cent of the maximum amount of my fees and commissions for deputy or clerical hire, that such amount as is retained must be expended by me for clerical or deputy hire, others are of the opinion that it is not necessary to expend the full amount retained for such clerical or deputy hire, but that the full twenty-five per cent may be retained by the collector regardless of how much thereof is expended for deputy or clerical hire, and I would appreciate having your opinion in the matter."

The salary of a collector is fixed by Section 9935, Laws of Missouri 1933, page 454. This section provides that the collector shall receive certain fees "as full compensation for his services in collecting the revenue, except back taxes*****." This is the only statute we are aware of that fixes generally the compensation of the collector. It is well settled in this state that public officials are not entitled to compensation unless they can place their finger upon the statute authorizing such compensation. State ex rel. vs.

Patterson, 152 Mo. Ap. 264, l.c. 268. King vs. Riverland Levee District, 271 S.W. 195, l.c. 196.

Section 9935a, Laws of Missouri 1935, page 406, provides for the payment of deputy and clerical hire, and fixes the amount that county collectors may retain for such purposes by the following language:

> "*****each such officer may retain for the payment of Deputy and/or clerical hire a sum not to exceed twenty-five per cent of the maximum amount of fees and commissions which such officer is permitted to retain*****."

Thus we see that from Section 9935a the twenty-five per cent allowance is <u>for the payment of deputy or clerical hire</u>.

We are of the opinion, as was set out by the Supreme Court in State ex inf. vs. Gate City Optical Company (Not yet reported):

> "Indeed, the statute seems so plain on its face as to furnish its own clear interpretation"

that the statutes involved were all so clear as to furnish their own interpretation, and we are of the opinion that the twenty-five per cent allowance to collectors for deputy and clerical hire must be paid for such deputy and clerical hire and that no part of it may be retained by the collector. If such deputy or clerical hire can be obtained for less than the twenty-five per cent maximum allowance, then the collector is entitled to retain only a sufficient amount, under twenty-five per cent, to pay for such deputy and clerical hire.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

FER:MM

COURTS:

INDUSTRIAL HOME FOR GIRLS:

Court may designate any woman to accompany a delinquent girl to State Industrial Home for Girls.

September 18, 1936.

FILED
66

Hon. Richard K. Nacy,
State Treasurer,
Jefferson City, Missouri.

Dear Sir:

We are in receipt of your letter of August 31st enclosing a letter from Miss Elfa Hamby, Superintendent of Public Welfare, Mt. Vernon, Missouri, and asking this department for an opinion on the questions contained in her letter. Her letter is as follows:

"For some time there seems to have been some argument as to just who should take, or rather who should accompany the delinquent girls from our Juvenile Court to The Girls' Industrial Home at Chillicothe.

"There is no argument in my mind about the matter, I know it has always been lawful and practiced here, that the Probation Officer shall accompany the girls who are subjects for Chillicothe, and have been sentenced there by our Juvenile Judge. In Statutes Vol. 2 Sec. 8374 provides that the Court shall appoint women attendants.

"My commission is under the title Superintendent of Public Welfare, while covers the work as Probation Officer, which may be found under Sec. 14193. And Sec. 14188 states that the Superintendent of Public Welfare shall act as representative of children's bureau.

"In Sec. 14144 we find the facts that the 'Probation Officers are hereby vested with all the power and authority of sheriff --'.

"Our Circuit Court will meet in September, and I now have petitions ready for the

> Juvenile Judge. Just who should you make the check to for the transportation, - the Sheriff, or the Probation Officer?"

We construe your question to be this: In counties having a population of less than 50,000 inhabitants, who is entitled under the law to officially accompany to the "State Industrial Home for Girls" such girls as are sentenced to said institution by the Circuit Court, sitting as a Juvenile Court, and what official shall be entitled to receive the fees allowed therefor?

Article 3 of Chapter 44, R. S. Mo. 1929, provides the course to be followed in committing wayward girls to the State Industrial Home for Girls. Section 8364 specifies the classes of those who may be so committed.

Section 8374 thereof provides as follows:

> "The circuit court of each county shall appoint women attendants to take to said industrial home for girls all girls committed to said home by the court. The same fees that are now allowed by law for conveying prisoners to the penitentiary shall be allowed to the said women attendants of the several counties of this state for the service of taking to said industrial home such girls as may be committed there, and such fees shall be paid by the state in the same manner as now provided by law in section 11791, chapter 84, R. S. 1929."

Section 14188, R. S. Mo. 1929, provides that the County Superintendent of Public Welfare shall act as local representative of the Children's Bureau of the State Board of Charities and Corrections, and shall perform certain other duties therein enumerated.

Section 14189 provides that said Superintendent shall co-operate with the State Employment Bureaus.

Section 14190 provides that said Superintendent may be deputized by the State Factory Inspector to perform certain duties.

Section 14191, among other things, provides that the Superintendent of Public Welfare and his assistants may be deputized as agents of the State Bureau of Labor Statistics, and invests him with certain other authorities.

Section 14192 provides that upon the request of any board having charge of a public school in any district in the county, said superintendent shall act as attendance officer to enforce the provisions of specified sections, and in such case shall have all the powers and duties of an attendance officer.

Section 14193 is as follows:

> "The county superintendent of public welfare shall act as probation officer for his county, without additional compensation."

Section 14194 provides that said superintendent shall be the agent of the county court in his county in investigating all requests for charity and applications of blind persons for pensions.

Chapter 125, Article 8, R. S. Mo. 1929, provides for juvenile courts in counties of less than 50,000 population. Section 14171 thereof provides:

> "The circuit judge shall designate or appoint an officer of the county or some other person to serve as probation officer under the direction of the court in cases arising under this article. The court may also designate or appoint one or more persons to act as deputy probation officers."

Section 14172 provides that the appointment of probation officers shall be reported to the State Board of Charities and Corrections, and that such probation officer may be removed for cause by the court, etc.

Section 14173 provides:

> "Whenever there is to be a child brought before the court under this law, it shall be the duty of the clerk of said court to so notify the probation officer in advance. It shall be the duty of the probation officer to make such investigation of the child as may be required by the court, to be present in court at the hearings of all cases, and to furnish to the court such information and assistance as the judge may require, and to take charge of any child before and after hearing, as may be directed by the court. Probation officers shall have all the powers of peace officers anywhere in the state for the purposes of this article."

Section 14171, supra, has been construed by the courts of this state in the case of In re Poindexter v. Pettis County, 295 Mo. 629, to the effect that when the county court appoints a county superintendent of public welfare, that person becomes the probation officer of the juvenile division of the circuit court, regardless of the provisions of said Section 14171.

Section 14173, supra, applies to the probation officer regardless of whether he is appointed by the circuit court or by the county court, and Section 14193 expressly says that the county superintendent of public welfare shall act as probation officer of the county, and this last section mentioned was enacted after Section 14171 became a law, and to the extent of inconsistency prevails over Section 14171.

Laws of Missouri, 1931, page 168, Section 14167, relating to treatment and correction of delinquent minors, among other things, provides:

> "In case of a delinquent child the court may commit such child, * * * if a girl, to the state industrial home for girls, * * *"

Laws of Missouri, 1933, page 189, Section 14096-a, among other things, states:

> "All of the powers and duties heretofore conferred upon and required by law of the State Board of Charities and Corrections with respect to the care, importation, supervision and placing of children, and the Children's Home at Carrollton shall hereafter be exercised and performed by the Board of Managers of State Eleemosynary Institutions until otherwise provided by law. Wherever in any law reference is made to said State Board of Charities and Corrections it shall hereafter be held and construed as the Board of Managers of State Eleemosynary Institutions."

It will be noted that Section 14173 provides that when a child is to be brought before the juvenile court, the clerk of the court shall notify the probation officer in advance, and it places the duty on the probation officer to investigate the child as may be required by the court, and to be present in court at the hearing, and to furnish the court with information and assistance as the judge may require, and further provides that said officer shall "take charge of any child before and after hearing, as may be directed by the court."

It will be further noted that Section 8374, which is a part of the chapter dealing specifically with the State Industrial Home for Girls, empowers the Circuit Court to "appoint women attendants to take to said industrial home for girls all girls committed to said home by the court."

Neither of these sections specifies that the probation officer shall accompany the delinquent child to the State Industrial Home for girls, Section 8374 merely requiring the court to appoint women attendants to take such girl to such industrial home, and Section 14173 leaving to the court the right to designate that the probation officer take such child to such home. In other words, Section 14173 seems to leave it within the discretion of the court to say whether the probation officer shall take the child to said institution, or whether some other person may do so, and absent the direction by the court to the probation officer to so take said delinquent child to such institution, such probation officer would not have authority to take charge of the child and transport it to the institution. Section 8374, while dealing directly with this question and with the State Industrial Home for girls, does not say that the probation officer shall perform these duties. While it would seem that the designation of the probation officer to so transport such child to the State Industrial Home would be an appropriate selection, yet it is not required.

CONCLUSION

It is our opinion that while the Circuit Court may very properly designate the probation officer of a county having a population of less than 50,000 inhabitants as the person to take a delinquent girls to the State Industrial Home for Girls, yet such court is acting within the law to exercise his discretion in designating the person to discharge this duty, except that the person designated must be a woman attendant, and of course the person so designated and performing these duties would be entitled to the fee therefor as provided by the statute, and would be entitled to the same fees that are now allowed by law for conveying prisoners to the penitentiary, such fees to be paid by the State.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN,
(Acting) Attorney General.

DW:HR

APPROPRIATIONS: Section 44a of Article IV of the Constitution constitutes appropriation for payment of interest on road bonds irrespective of legislative action.

December 10, 1936.

12-10

FILED
66

Hon. Richard R. Nacy
State Treasurer
Jefferson City, Missouri

Attention of Mr. H.S. Johnson, Chief Clerk.

Dear Sir:

We are in receipt of your letter of December 8, 1936, requesting an opinion of this office on the following matter:

> "On page 8, Sec. 4, 1935 Session Acts the following appropriation was made. Interest on Road Bonds falling due in 1935 - 1936- - - - - - -$8,756,700.00.
>
> It has just been called to my attention that Auditor's warrant had been issued against this appropriation for $36,450.00 in excess of said appropriation, and that drafts had been issued for the same payable to our fiscal agent, the Chase National Bank, New York City, before it was discovered by this department that the appropriation was overdrawn, and draft had been mailed.
>
> Will you kindly give me your official opinion whether or not payment should be stopped on this draft."

From subsequent oral conferences the issue is limited to the simple proposition as to whether or not a legislative appropriation is a prerequisite to the payment of interest on road bonds falling due in 1935 and 1936.

I.

No specific legislative appropriation necessary to authorize payment of interest on state road bonds issued pursuant to Section 44a of Article IV of the Constitution.

The bonds upon which the interest is sought to be paid were issued pursuant to Section 44a of Article IV of the Constitution of the State of Missouri. A portion of that article reads as follows:

> "All state motor vehicle registration fees, license taxes or taxes authorized by law on motor vehicles (except the property tax on motor vehicles and state license fees or taxes on motor vehicle common carriers) and also all state taxes on the sale or use of motor vehicle fuels authorized by law, less the expense of the collection of such registration fees and license taxes on motor vehicles and taxes on the sale or use of motor vehicle fuels and less also the cost of maintaining the State Highway Department and the State Highway Commission and the cost of administering and enforcing any state motor vehicle law or traffic regulation shall, after the issuance of any of said bonds and so long as any of said bonds herein authorized remain unpaid, be and stand appropriated without legislative action, to the payment of the principal and interest of the said bonds and for that purpose shall be credited to the State Road Bond Interest and Sinking Fund provided by law.*********"

By the foregoing provision, the Constitution has by specific direction, appropriated the revenue derived from the sale of motor vehicle license tags and from the motor vehicle fuel tax to the payment of the principal and interest on the bonds issued pursuant to that section, after payment of certain charges against those funds. We understand that there are

ample funds available and that the problem is not complicated by a shortage of revenues for payment of the cost of collecting this revenue, the maintenance of the State Highway Department and the State Highway Commission, the maintenance of the State Highway Patrol, or the meeting of the payments of principal and interest upon the bonded debt. It is our view that this constitutional appropriation is sufficient to authorize the payment of the maturing interest irrespective of the appropriation contained in Section 4 of the appropriation bill found on page 8 of the Laws of Missouri of 1935. The general rule is thus stated in 59 Corpus Juris 237, Section 381, as follows:

> "Constitutional provisions are not to be construed as themselves making appropriations unless they are clearly so intended. Self-executing provisions of the constitution specifically appropriating particular funds or sums for designated purposes exempt the matters therein dealt with from the necessity of legislative appropriation established by other provisions of the constitution, and the constitutional provisions are themselves a sufficient appropriation for the purposes and to the extent comprised within their terms; and no legislation may be enacted such as will impair the operation of a constitutional appropriation."

Cases from several jurisdictions are cited in support of the portion of the above statement holding the constitutional provisions are themselves sufficient appropriation when the purpose to appropriate is clear. Our Section 44a of Article IV is plain in its terms. The purpose to appropriate is clear. However, we have a direct statement on this proposition by our Supreme Court in the case of State ex rel. McKinley Publishing Company vs. Hackmann, State Auditor, 282 S. W. 1007. In this case the position was taken by the plaintiff that Section 44a of Article IV of the Constitution amounted to a constitutional appropriation to the State Highway Department

of all funds necessary for the maintenance of the Department. Although this contention was overruled by the Supreme Court the Court stated relative to a construction of Section 44a of Article IV as follows on page 1013:

> "This provision makes no attempt to appropriate, without legislative action, the money to pay the maintenance expense of the highway commission. It does appropriate without further legislative action that portion of the money received from automobile license fees which remains after deducting the cost of collecting the tax and maintaining the highway commission, and it appropriates the remainder to the payment of the principal and interest of certain bonds.**********

> Section 19, article 10, of the Constitution of Missouri, expressly provides that no money shall be paid out of the State Treasury, except in pursuance of an appropriation by law. This section controls, unless modified by a later constitutional provision. It is true that section 44a, supra, does modify it as to that portion of the automobile license tax to be paid upon the principal and interest of said bonds, but that is the only modification, and there is nothing in section 44a which in any manner conflicts with, or prevents the provisions of, section 19, supra, from controlling with reference to all moneys paid out of the state treasury for the support and maintenance of the highway commission. It thus clearly appears that that portion of the license tax which is to be paid out of the state treasury for the expenses of maintaining the highway commission must, under the express provisions of the Constitution (section 19, supra), be first appropriated by act of the Legislature.

> The above construction of the section was given by the General Assembly, succeeding the adoption of section 44a of article 4, supra (Laws 1921, 1st Ex. Sess. p. 104). That was the act providing for the levying, collecting, and disbursement of the present motor vehicle license taxes or registration fees. Section 28 of that act provided that all such fees or taxes 'shall be made payable to the state treasurer.' and, after road bonds are issued, said fees shall be deposited to the credit of a fund provided for in the Constitution."

We believe that these statements of theSupreme Court as to the construction of this section of the constitution should be followed in the instant case and in themselves supply the answer to your inquiry.

CONCLUSION.

It is therefore the opinion of this office that interest on State road bonds issued pursuant to Section 44a of Article IV of the Constitution of Missouri may be paid pursuant to the constitutional appropriation found in that section authorizing the payment of such interest and that such constitutional appropriation is not limited by the legislative appropriation contained in Section 4, page 8, Laws of Missouri 1935.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

FRANKLIN E. REAGAN,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

HGW:FER:mm

CHATTEL MORTGAGES: NOTICE: Chattel mortgages on unplanted crops are equitable liens. If mortgagee is in possession, his rights are superior to third parties. (Cases distinguished.)

8-18

July 30, 1936.

FILED
67

Mr. Tyson Nichols,
Brunswick, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

> "I am writing to your office for information concerning a Chattel Mortgage given on a growing crop. This is what I want to know. Is a Chattel Mortgage given on a crop before the crop is even planted good, or does the grain have to be up so one can see it or is it good if the seed is just germinated? The Harvester Companies take mortgages on crops three or four months before the crops are to be planted, for instance, they would take a mortgage on a wheat crop today said chattel reading for wheat to be planted in the Fall of 1936 and harvested in the year 1937. I have been told by attorneys that these chattels are not good if some one comes inwith one after the crop is planted and up and growing.
>
> "I am very anxious to get this above information and will very much appreciate your answer. I hope I have made my question plain enough for you to understand what I want to know."

In the case of Keating v. Hannenkamp, 100 Mo. 161, the court discusses the rights of the partieswhere they had agreed by chattel mortgage that certain properties which were not yet purchased were included in the mortgage, and says, l. c. 167:

"Though the property described in the mortgage was not in the building at that date, still the mortgage was good in equity, and the property became subject to the equitable lien as soon as it was placed in the building. This doctrine has been so often declared by this court that it is only necessary to refer to the following cases: Wright v. Bircher, 72 Mo. 179; Frank v. Playter, 73 Mo. 672; Rutherford v. Stewart, 79 Mo. 216. Such equitable lien is valid as against the mortgagor and also as against Keating who had both actual and constructive notice of the mortgage."

And further says, l. c. 168:

"'Though a grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some act.' Under this maxim of Lord Bacon it is held that 'possession taken by a mortgagee of after-acquired property, under authority given in the mortgage, before rights had been acquired by others, makes it a valid lien upon such property.' Jones on Chattel Mortgages (3 Ed.) sec. 164. The rule just stated is, of course, one at law. But it must follow that possession acquired by a mortgagee under the terms of the mortgage will also vest the legal title in him in those cases where the mortgage of after-acquired property creates an equitable lien. The circumstance that it creates an equitable lien, good against creditors and subsequent purchasers with notice, cannot affect the legal consequences arising from taking possession. Hannenkamp had the right given to him in the mortgage to take possession upon default, and when he took possession he stood in the same position as if his mortgage had been one good and valid at law from the beginning. He had the right to sell and to execute the powers contained in the mortgage without the aid of a court of equity, and his sale passed a valid title both at law and in equity."

In the case of Steckel v. Swift & Co., (St. Louis Ct. of Apps., 1933), 56 S. W. (2d) 806, 808, the court says:

> "Briefly stated, and in so far as it affects the controversy between Steckel and Swift & Co., the rule is that, where the mortgagee does not take possession of the after-acquired property upon its acquisition by the mortgagor and before the rights of an innocent third party have attached, the provision in question will be held void as to such innocent third party, nor will the constructive knowledge furnished by the recording of the instrument be regarded as sufficient notice." (Citing a number of Missouri cases.)

In the case of Page v. Riggins, (Springfield Ct. of Apps., 1929), 20 S. W. (2d) 164, the tenant had agreed to give the landlord a chattel mortgage on his work stock, tools, implements and crops to secure his landlord for furnishing the money. Thereafter the tenant actually executed a mortgage on his crops to a third person who had no knowledge of the prior agreement between the tenant and the landlord. The court holds that as between the tenant and the landlord, the landlord was entitled to an equitable mortgage on the property, but finds that the person to whom the mortgage was given after the execution of the agreement between the landlord and the tenant had no knowledge of the agreement between the landlord and tenant, and that therefore the mortgage which was thereafter actually executed to the third party, Stokes Bros. Store Company, was a valid lien and superior to the equitable lien in favor of the landlord.

In the case of Clayton v. Gentle, (Springfield Ct. of Apps., 1929), 14 S. W. (2d) 672, the court says:

> "No mortgage on after-acquired property conveys title to such property. All it does do is to convey an equitable lien, which attaches when the property is acquired."

In the case of First National Bank v. Johnson, (Springfield Ct. of Apps., 1927), 221 Mo. App. 31, Guthrie gave his note and chattel mortgage to plaintiff bank on March 14, 1924, due October 29, 1924, on his half interest in forty acres of cotton to be thereafter planted on a certain farm. This mortgage was filed March 22, 1924. On April 12, 1924, defendant Johnson gave

a note to the plaintiff bank due December 12, 1924, to secure which, on the same date, he executed to the plaintiff bank a chattel mortgage on his half interest in the same cotton described in the Guthrie mortgage. The cotton was not planted when the Johnson mortgage was given, the mortgage being filed April 21, 1924. On May 29, 1924, after the cotton was planted and growing, Johnson gave to the defendant Lazalier another mortgage on a three-fourths interest in the cotton on the land described in the two previous mortgages. This mortgage to Lazalier was filed June 4, 1924.

The controversy is between the plaintiff bank and the defendant Lazalier. The bank relied on the two mortgages given to it prior to the time the cotton was planted, and defendant Lazalier relied upon the mortgage given to him by Johnson after the cotton crop was planted and growing.

By agreement of the parties the cotton crop was gathered and the net proceeds deposited in the defendant bank to be turned over to the rightful claimant. Thereafter the defendant bank filed a bill in the nature of a bill of interpleader praying that it be allowed to bring said fund into court, and offering to do so, and asking that the plaintiff First National Bank of Corning, Arkansas, and the co-defendants, R. W. Johnson and Ed Lazalier be required to litigate and cause to be determined which of them is entitled to receive said amount, and that upon payment of said fund into court, "this answering defendant prays to be relieved and discharged of any and all liability to the plaintiff or its co-defendants, and that it be discharged with its costs."

The Court of Appeals holds that this was an equitable proceeding, and further holds that the mortgage on the unplanted crops is a valid and superior encumbrance to the mortgage executed thereafter and after the crops were planted. The trial court so found, stating:

> "We cannot hold that plaintiff's mortgages were nothing more than agreements for a lien of some undefined nature and thereby destroy a very common form of security.
>
> "Therefore we find the issues for the plaintiff herein and that the mortgages held by the plaintiff take precedence and have priority over the mortgage held by defendant, Lazalier, he having had constructive notice thereof."

The court further says, l. c. 36:

> "In 11 C. J. 443, it is said: 'Where a mortgage is given on crops, the seeds to produce which have not been sown, it is held in some jurisdictions, in the absence of statutory provisions to the contrary, that the mortgage is void at law as being a mortgage on future property, although it may confer a lien on the crop, on its coming into existence, which a court of equity will enforce against persons other than bona-fide purchasers without notice; but in most jurisdictions such mortgages are upheld either by force of express legislative enactment, or on the theory that the crop has a potential existence sufficient to give the mortgage validity.'
>
> "The interested may find in the Corpus Juris notes authority pro and contra on the proposition that constructive notice of a mortgage on unplanted crops is sufficient to protect the mortgagee as against subsequent purchasers, mortgagees and creditors without actual notice. The general rule seems to be that in those jurisdictions without validating statutes a mortgage on unplanted crops is void at law, but valid in equity and that record notice is sufficient to protect the mortgagee when he is seeking to establish his lien in a court of equity. It was so held in Apperson v. Moore, 30 Ark. 56, 21 Am. R. 170, and this ruling was prior to the Arkansas Act of February 11, 1875, making valid mortgages on unplanted crops. (See Kirby & Castle's Arkansas Digest (1916), sec. 6407.) Prior to the validating statute the Supreme Court of Arkansas held that such mortgages could not be enforced in actions at law. (See Apperson v. Moore, supra, and Tomlinson v. Greenfield, 31 Ark. 557.) In L. R. A. 1917C, page 11, will be found a somewhat exhaustive note on the validity of mortgages on unplanted crops. To attempt to analyze the cases cited in the note would extend this opinion beyond reasonable limits, hence we merely refer to the note so that the interested may examine if desired.

> "We have no statute validating mortgages on unplanted crops, but our courts have uniformly and from an early date recognized the equities attaching to such mortgages. If such mortgage is given in contemplation of planting and cultivating the crops within the crop season of the year the mortgage is given our courts have uniformly recognized that the mortgagee has an equitable lien upon the crop when it comes into existence, and if such mortgage is duly filed or recorded in accordance with our recording laws we rule that the constructive notice given by the record is sufficient to protect the mortgagee as against subsequent purchasers, creditors or mortgagees in an action in equity to enforce the equitable lien created by such mortgage."

It would seem that an equitable lien is created as between the parties and those having notice thereof on the execution of an agreement between two parties that the one would execute to the other a mortgage on property, even though the property so agreed to be mortgaged was not then in existence or was not then owned by the mortgagor; that having so agreed, the lien attaches at the time the crop is planted by him in the one instance and purchased by him in the other. Such is the holding of the cases cited hereabove prior to the last case hereabove cited.

The last case hereabove cited holds that where the chattel mortgage is actually executed instead of a mere agreement to execute the chattel mortgage, that such chattel mortgage, when recorded, notwithstanding the property so mortgaged is after-acquired or afterward planted, gives constructive notice to the world of its existence, and the chattel mortgage so executed prior to the acquisition of the property is a superior lien to a mortgage executed subsequent thereto and after said crop is planted or said property actually acquired.

For the purposes of this discussion, we assume that there is the proper certainty of description and designation of the crops in question, and that there is no other irregularity.

It will be observed that the above cases announce different rules. The case of First National Bank v. Johnson (decided by the Springfield Court of Appeals in 1937) holds that the recording of the chattel mortgage covering unplanted crops affords constructive notice to the world, and that such mortgage is superior to a mortgage executed after the crop is planted. The holding of that court in that case appears to be contrary to the expressions of other Court of Appeals cases.

The case of Steckel v. Swift & Co., (decided by the St. Louis Court of Appeals in 1933) announces the rule that where the mortgagee does not take possession of the after-acquired property upon its acquisition by the mortgagor, and before the rights of an innocent third party have attached, the provision as to mortgaging after-acquired property is void as to such innocent third party.

The case of Clayton v. Gentle (decided by the Springfield Court of Appeals in 1929) supports the view of the case of Steckel v. Swift & Co.

We do not find where the Supreme Court of this state has passed on this question, and we believe the Court of Appeals of a given district will follow its last previous decision on the question rather than going contrary to a decision of its own court and following the decision of one of the other Courts of Appeals, and the decision of a Court of Appeals deciding a case is final as to such case unless it is certified to the Supreme Court.

The cases seem to be in harmony in announcing that an equitable lien is created on after-acquired property, but as to whether constructive notice is afforded so that there could be no innocent purchaser for value when the mortgage is filed for record and covers after-acquired property, the decisions are in apparent conflict.

CONCLUSION

We are of the opinion that when the Harvester Company takes a mortgage on a corn crop (for illustration) three or four months before the crop is planted, and the mortgage reads so that it clearly covers and defines the corn crop that is to be planted in a certain year on a certain farm, and is to be gathered in a certain year, that an equitable lien is thereupon and thereby created in favor of the mortgagee, and that the

same may be enforced as between the mortgagor and mortgagee and those with actual notice, and that if the mortgagee is in possession of the property at the time the crop is planted, his rights would be superior to those of third parties.

The case of First National Bank v. Johnson, supra, has never been in terms overruled, and if that decision were followed, and if such mortgage is duly placed of record, not only an equitable lien is created, but there is constructive notice to the world of its existence, and the rights thereto are superior to those of a third person, though he be an innocent purchaser for value.

If the decision in the case of Steckel v. Swift & Co., is followed, then it would seem that the mortgage, even though recorded, does not afford constructive notice as against innocent purchasers for value, that is innocent mortgagees, but it would only be good (absent the mortgagee being in possession) as between the parties thereto and those having actual knowledge of their rights.

We are inclined to the view that if this question were presented to the Supreme Court, that court would hold that the mortgage of unplanted crops, where the mortgagee is not in possession, would not be constructive notice to innocent purchasers for value, even though the mortgage was duly filed or recorded, and that it would be held that the rights of the mortgagee only extended to the creation of an equitable lien on such crops which would be good only as between the parties and those having actual notice of their rights.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN,
(Acting) Attorney General.

DW:HR

COUNTY CLERK: 8 questions relating to fees.

2-20

February 14, 1936.

FILED
68

Hon. J.R. Oliver,
Clerk of County Court,
Dunklin County,
Kennett, Missouri.

Dear Sir:

Some time ago this department received a letter requesting an opinion on various items with respect to the fees of county clerks. In complying with your request, we shall undertake to divide the questions as outlined in your letter.

I

> "Section 12183, 1929 statutes provides an allowance to be fixed by the Court for various services, specifically excepting sections 12145, 12146 and 12147. Section 12161 provides for various duties to be performed by the county clerk. Noting the aforesaid exceptions, I am of the opinion that I am permitted to charge five cents for filing cancelled warrants. Is this charge also applicable to filing other vouchers presented by the Treasurer in his settlements?"

Article 8, Chapter 85, relating to county treasurers, funds and warrants, contains provisions relative to the duties of the county clerk, the principal section being Sec. 12161, R.S. Mo. 1929, which provides:

> "It shall be the duty of the clerk of the county court: First, to keep regular accounts between the treasurer and the county, charging him therein with all moneys paid into the treasury, and crediting him with the amount he may have disbursed between the periods

> of his respective settlements with the court; second, to keep just accounts between the county and all persons, bodies politic and corporate, chargeable with moneys payable into the county treasury, or that may become entitled to receive moneys therefrom; third, to file and preserve in his office all accounts, vouchers, and other papers pertaining to the settlement of any account to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk, shall be admitted in evidence in all courts of law and elsewhere; fourth, to issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection of the same, or any judge thereof."

The above section states in detail your duties with respect to accounts. With reference to vouchers we call your attention to the words "third, to file and preserve in his office all accounts, vouchers and other papers pertaining to the settlement of any account to which the county shall be a party, copies whereof, certified under the hand and seal of the clerk * * * * *" The section does not provide any specific fee or compensation for the duties therein enumerated, nor does any other section in Chapter 85 indicate any specific fee.

We have consulted Section 11781, R.S. Mo. 1929, same being the section in which general fees of the county clerk are enumerated, and we find no provision which, in our opinion, would entitle you to any such fee. We therefore conclude that the compensation for the duties on your part is governed by Section 12183, which provides:

> "The court shall allow to the clerk of the county court, for his services under this article (except sections 12145, 12146 and 12147) such compensation as may be deemed just and reasonable."

On March 30, 1935, this department rendered an opinion to Hon. L.E. Cass, Clerk of the County Court, Marshfield, Mo., in which it was held that the county clerk is not entitled to any fee for issuing county warrants or for cancelling the same, but is entitled to the fee of $.05 as provided in Sec. 11781, R.S. Mo. 1929 for the filing of said cancelled county warrants.

II

"Section 11781 provides for a charge of $.10 per 100 words and figures for recording papers not otherwise provided for. Am I entitled to this fee for recording and indexing accounts, and if I am, would it be permissable for me to charge for words printed in the county court record of accounts allowed?"

Section 11781, R.S. Mo. 1929 provides:

"* * * For copies of records and papers not hereinbefore provided for, for every hundred words.....$.10"

We are of the opinion that this provision refers and applies to records other than county court minutes or records; that when in the course of the proceedings of the court it is necessary for you to supply copies of the record of the minutes, a charge of $.10 per hundred words could be made, otherwise, you are not entitled to the charge of $.10 for recording and indexing accounts and for the record of the allowance of the same. It is our opinion that the compensation for such services is covered by the general section, 12183, and, as stated before, the copying of the minutes come within the provisions of Sec. 12161, for which there is no special compensation allowed you except that as provided in Sec. 12183, R.S. Mo. 1929.

III

"What fees, if any, is the Clerk entitled to for the services rendered in the opening and adjournment of court from day to day? More particularly, is adjournment an order of the Court?"

Section 2083, R.S. Mo.1929 provides for the terms of court and when the same shall be held. The section does not contain any provision for any formal opening of the court, nor does Sec. 11781 provide for any fee for you as county clerk when court is opened--in fact, we are of the opinion that strictly speaking, it

is not your duty to open court, nor to adjourn the same. We presume you refer to the provision in Sec. 11781 "For every rule or order not hereinbefore specified, or copy thereof.....$.15". However, we are of the opinion that this does not refer to the orders of opening and adjourning the county court and as a consequence, you are not entitled to the fee of $.15.

IV

"Accounts are often filed which are not approved by the Court for a period of several days of court sessions. Are these accounts to be regarded as continued?"

Section 12161, R.S. Mo. 1929, quoted in Part I of this opinion contains the provisions:

"third, to file and preserve in his office all accounts, vouchers, and other papers pertaining to the settlement of any account to which the county shall be a party, * * * * fourth, to issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection of the same, or any judge thereof."

We construe this section to mean that if the accounts remain unapproved and unaudited by the county court for a period of several days, the same are not continued and that it is your duty to keep them on hand ready for the inspection and consideration of the court and that there is no special fee for you in doing so; the duties performed by you in connection therewith are taken in consideration in the general compensation section, to-wit, Sec. 12183; therefore, the provision for every continuance of a cause or other proceeding is not applicable to the accounts which have been unaudited or delayed by the county court.

V

"Are accounts allowed considered as judgments or orders?"

We assume this question relates to the provision in Section 11781, R.S. Mo. 1929, which provides:

"*** For entering every judgment.....$.30 * * *"

On April 24, 1935 this department rendered an opinion to to the Honorable Elliott M. Dampf, Prosecuting Attorney of Cole County, in which this question was discussed and the allowing of an account was declared not to be a judgment. Copy of said opinion is enclosed herewith.

VI

"Distinguish between 'oath' and 'certificate' for which I am permitted to charge $.25, and 'certificate' and 'seal' for which I am allowed $.50."

Section 11781, R.S. Mo. 1929 provides, among other things, "For every certificate and seal not hereinbefore provided for.....$.50" and "For oath and certificate to an affidavit...$.25". Section 4480, R.S. Mo. 1929 refers to the meaning of "verified" and "oath" and is as follows:

"The word 'verified' when applied to any pleading or paper required in any criminal cause means supported by oath or affirmation. The word 'oath' includes the word 'affirmation', and the phrase 'to swear' includes 'to affirm.'"

In discussing the question of fees of a Notary Public and the definition of "certificate" and "seal", the Supreme Court of Missouri, in the case of Land & Imp. Co. v. Morten, 183 Mo. App. 637 said (l.c. 640-642):

"It is argued that, as the statute is to be strictly construed, it does not reveal an intention on the part of the Legislature to allow a

greater fee to a notary public for the same service than that authorized in favor of a justice of the peace, and it is said the last clause of the statute on notaries above referred to manifests a purpose of the Legislature to refer matters of this kind for determination by the schedule of fees prescribed for justices of the peace. But, obviously, this argument is unsound, for it appears the Legislature has pointedly, in express terms, fixed the fee in favor of notaries public to be 'For certificate, attested by seal, fifty cents.' It will be observed, by reference to section 10692, concerning the fees of a justice of the peace, that the Legislature referred to such a service as rendered here--that is, the endorsement thereon by the justice of his official voucher or jurat that the affiant had sworn to and subscribed the facts stated in the affidavit--as a 'certificate', for it says 'for certificate to affidavit, fifteen cents.' Obviously, if this service of the justice be a certificate made by him in the process of taking an affidavit, then it is to be regarded in the sense of the Legislature as a certificate, too, when performed by a notary public. Section 10712, pertaining to the charges, reads, 'For certificate, attested by seal, fifty cents.' It appears, therefore, that the Legislature classified this service when performed by a justice of the peace as a certificate, and from this the intention is clear that the word 'certificate', when used in connection with the notary's fees, intends, among other things, the same--that is, the affixing by the notary of a jurat to an affidavit taken by him--but requires the further act on his part of attestation by his seal. The word 'certificate' is defined

> by Webster as 'A written testimony to the truth of any fact.' It is clear that the written jurat of a notary public officially made and attested by his seal is a written testimony to the truth of the fact that the affiant subscribed and was sworn to the affidavit in his presence and by him. Moreover, it appears by reference to the statute, section 10178, by which the powers of a notary public are conferred, that such an officer is authorized to 'certify....affidavits....and administer oaths and affirmations in like cases and in like manner as justices of the peace are authorized by law.' When these statutes are considered together, no one can doubt that the notary public is authorized to administer the oath to an affiant and to make a certificate of that fact on the affidavit identically as a justice of the peace is authorized to do so, and as was done in this case, but the act of a notary should be attested by his seal."

We think when you are called upon to take the jurat to an affidavit or other instrument and the same requires the seal of the office and you certify to the truth of the same, the doing of such act entitles you to the fee of 50¢, but when you merely certify under oath of your office that an instrument or writing is true, or that the same is a true copy thereof, you are entitled to the fee of 25¢.

VII

> "An order is not usually made admitting paupers to the County Farm. Am I entitled to the fee which would be due me if such cases were handled in the regular manner?"

Section 11781 provides "For every rule or order not hereinbefore specified, or copy thereof.....$.15". Applying this provision to the question of admitting paupers to the County Farm, we

are of the opinion that when such an order is made at the direction of the county court, you are entitled to the fee. We are at a loss to understand why such orders are not made and if the same is not done, you are not entitled to the fee.

VIII

"Will you please advise if I am allowed the filing fee of $.05 for each of the following: County treasurer's receipts, Ex-officio collector's receipts and Township Collector's receipts. Also, the various settlements of the aforesaid officers?"

We are unable to find any statute entitling you to the fee of $.05 for filing county treasurer's, Collector's and other receipts. The words in Section 11781 "For filing every paper not hereinbefore specified", we believe, refers to and means other papers and receipts than which you are by statute compelled to file. Therefore, it being a well recognized rule of law that an officer may only receive fees which the statute gives to him and that the same should be strictly construed, we are of the opinion that you are not entitled to any fee for the filing of the receipts enumerated; also, by reason of the case of Land & Imp. Co. v. Morten, 183 Mo. App. 637.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

February 28, 1936.

FILED
68

Hon. R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Mo.

Attention: Mr. J.F. Allebach,
Assistant Counsel

Dear Sir:

This department is in receipt of your letter of this date with reference to the Mound City Life Insurance Company.

We have examined the Declaration of Intention to form said corporation and find same to be in accordance with the provisions of Article Article 2, Chapter 37, R.S. Mo. 1929, and not inconsistent with the Constitution and laws of this state and of the United States.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

JWH:AH

SCHOOLS: Expenditures for furnishing and repairing school building is for school purposes; taxpayer only has right to question levy for legality; and other questions.

March 7, 1936.

3-11

FILED
68

Mr. J. R. Oliver
Clerk County Court
Dunklin County
Kennett, Missouri

Dear Sir:

This is to acknowledge your letter wherein you request our opinion on the following questions:

> "I would suggest that your opinion have to do with the following questions. However, if these questions do not in your opinion bring out what we have in mind please let us know what questions we could ask to clear up this point.
>
> "Do expenditures for furnishing, repairs, insurance and maintenance of school buildings fall in the legal maximum for 'school purposes'?
>
> "Can a rate be questioned in that it will raise more money than is necessary for (1) school purposes, (2) sinking or interest fund, or (3) for repairing furnishing or erecting buildings?
>
> "Who has the power to determine whether or not a rate is excessive or illegal?
>
> "If such an illegal or excessive rate is certified to the County Clerk, and by him extended on the tax books, does such an illegal or excessive rate gain validity by the lapse of time?"

I.

Do expenditures for furnishing, repairs, insurance and maintenance of school buildings fall in the legal maximum for 'school purposes'?

The Constitution of Missouri, Section 11, Article X, specifies the maximum rates that school districts may charge for school purposes; the pertinent part of said constitutional provision being as follows:

> "For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers, voting at an election held to decide the question. vote for said increase."

You will note that the Legislature has divided school districts into two classifications, namely, (1) districts formed of cities and towns, and (2) "other" districts. If a district formed of cities and towns desires to levy a rate of one dollar it takes a majority vote of the taxpayers voting at the election to do so, and if other districts desire to levy a rate up to sixty-five cents on the one hundred dollars valuation, then it takes a majority vote of the taxpayers voting at the election to do so. Whether the school district be either a city or town district, or other district, such cannot exceed the rates for "school purposes" prescribed by the Constitution. Jacobs et al. v. Cauthorn et al., 248 S. W. 343, l. c. 345; Harrington v. Hopkins et al., 231 S. W. 263.

You will note that the Constitution quoted aforesaid uses the words "annual rates for school purposes," and you request whether or not certain expenditures fall within the definition of the words "for school purposes."

The Supreme Court of Missouri in Hudgins v. Mooresville Consolidated School Dist., 278 S. W. 769, defined the words "school purposes" as follows (l. c. 771):

> "The constitutional limitation in section 11, as applied to a levy of taxes by school districts, has reference to the annual rate of such levy for school purposes for that year. By 'school purposes,' as the term is used in the Constitution, is meant such annual expenditures as are necessary to the conduct or maintenance of the school during the year. C. & A. R. Co. v. People, 163 Ill. loc. cit. 621, 45 N. E. 122. The fixed rate in districts, as at bar, for school purposes, is 40 cents on the $100 valuation of the property of the district. This rate may be increased for the same purpose, by a majority vote of the people, to 65 cents on the $100 valuation. These limitations, however, have no application to the creation of a debt for building purposes and the equipment of such buildings as may be erected. The Constitution, in effect, so declares in providing that:
>
> "'For the purpose of erecting public buildings * * * in school districts the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such * * * school district, voting at such election, shall vote therefor.'"

Therefore, it is our opinion that if expenditures for furnishing and repairing school buildings are necessary to the

conduct or maintenance of the school during the year, then such furnishing and repairing is included in the term "school purposes."

Note the language of the court en banc in Harrington v. Hopkins et al., supra, when it construed Section 11 of the Constitution:

> "The language of the section just quoted is too plain to need construction. It limits the collection of all taxes in a school district such as this to $1 on the $100 valuation for all school purposes; that is, the rate cannot be increased in such a district for all school purposes in a sum in excess 'of one dollar on the hundred dollars except for the purpose of erecting public buildings,' etc., and there is no pretense that this 90 cents was voted for the purpose of erecting a schoolhouse, or other public buildings, but solely to repair and furnish a building already existing. In no sense can the words 'furnishing' and 'repairing' be construed to mean the 'erection of public buildings,' as those words are used in the Constitution."

II.

Can a rate be questioned in that it will raise more money than is necessary for (1) school purposes, (2) sinking or interest fund, or (3) for repairing furnishing or erecting buildings?

In our opinion a taxpayer may question a tax levy, if he believes it is illegal. No other person is privileged to raise that question, and if the taxpayer does not, the levy stands whether legal or illegal. The taxpayer in order to obtain relief from an invalid tax levy would have to resort to a court of equity as was done in the cases of Harrington v. Hopkins et al. and Jacobs v. Cauthorn et al.,

supra. If a taxpayer complains to the county court that a levy is illegal such court cannot grant relief to the said taxpayer.

In our opinion to you, dated November 23, 1935, we held that the county court, in determining the rate for school purposes on distributable property of public utilities, must take the average rate and not the rate necessary to operate the schools. We quote from said opinion:

> "The duty upon the county court is to take the average of the taxes levied in all school districts and not the average of what might be necessary to operate the schools. * * * * * * * * * * * * * * * * *
>
> "'The only thing the county court has to do relative to fixing the rate of taxation for school purposes against distributable property of railroads and public utilities is to take the rates levied in each district and add them together and strike an average. There is a vast difference between what rates are levied in each district and what rates may be necessary to operate the school. The statute says 'the several county courts shall ascertain from the returns in the office of the county clerk the average rate of taxation levied for school purposes.'"

Thus it follows that if only the circuit or appellate courts can grant relief to a taxpayer on an invalid tax levy it would not avail said taxpayer anything to question the rate, except before said courts. Hence, we believe it unnecessary to answer the question of "Can a rate be questioned in that it will raise more money than is necessary for" certain school purposes, as the matter must be done before the courts and is of no concern of the county court or circuit clerk, as such are powerless to grant relief to a taxpayer upon his complaint that more taxes are sought than is necessary to operate the schools. We believe the taxpayers will not vote more taxes than absolutely necessary to maintain the schools, and will keep within the constitutional limits.

III.

Who has the power to determine whether or not a rate is excessive or illegal?

The above question has been answered under part II above and we repeat that the circuit or appellate courts only have the power to determine whether or not a rate is illegal.

IV.

If such an illegal or excessive rate is certified to the County Clerk, and by him extended on the tax books, does such an illegal or excessive rate gain validity by the lapse of time?

We answer the abcve question by quoting from the decision in the case of White et al. v. Boyne et al., 30 S. W. (2d) 791, wherein the Springfield Court of Appeals said (l. c. 792):

> "The purpose of this action is to restrain the collection of all taxes levied by the consolidated district for school purposes for the year 1927. The point is made that since the consolidated district was not organized until after June 30, 1927, it could not maintain school as a consolidated district and levy taxes therefor in the school year 1927. We mention this to show the legal question sought to be raised and have decided in this case. It is our opinion, however, that the further facts shown by the record force us to the conclusion that plaintiffs have slept on their rights and the delay in bringing suit to enforce them prevents their recovery in this action. * * *

taxes must have been paid, and before the time of its determination the greater portion would be paid. It is true, as urged by counsel for plaintiff, that injunction is a proper remedy to enjoin thecollection of taxes levied in excess of the rates allowed by the Constitution or without authority of law. But there are other conditions precedent to the proper exercise of such a remedy. In such cases the injury to the complaining party must appear to be substantial, and not disproportionate to the relief sought or to the loss and inconvenience of others and of the public, and the application * * * must be seasonably made in view of all the conditions. (Italics are ours.)"

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

March 23, 1936

FILED
68

Hon. R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Missouri.

Attention: Mr. J.F. Allebach,
Assistant Counsel

Dear Sir:

This department is in receipt of your letter of March 19 enclosing Notice of Filing Declaration under the provisions of Sec. 5693, R.S. Mo. 1929 in connection with the formation of the First National Life Insurance Company.

We have examined said Notice of Declaration and find same to be in accordance with the provisions of Article 2, Chapter 37, R.S. Mo. 1929, and not inconsistent with the Constitution and laws of this State and of the United States.

Very truly yours,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

JWH:AH
Encl.

BANKS AND BANKING. (1) A corporation has no other powers than such as are conferred on it by the sovereign creating it, or such as may be fairly implied from those expressly given; (2) A bank incorporated in Missouri has no power to engage in the business of writing insurance; (3) Trust companies incorporated under the laws of the State of Missouri may engage in the business of writing insurance as agent or as broker; (4) Remedies.

April 9, 1936.

FILED
68

Honorable R. E. O'Malley,
Superintendent of Insurance Dep't.,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your request for an official opinion relative to banks and trust companies engaging in the business of insurance by acting as agents or brokers.

Necessarily, in answering this request, we limit ourselves to a discussion of such powers of banks and trust companies incorporated under the laws of the State of Missouri.

I.

A Corporation has no other powers than such as are conferred on it by the sovereign creating it, or such as may be fairly implied from those expressly given.

A corporation, whether it be a corporation formed for conducting a banking business or otherwise, has no other powers than such as are conferred on it by the sovereign creating it, or such as may be fairly implied from those expressly granted. This much is axiomatic.

Section 7, Article XII, of our Constitution provides:

> "No corporation shall engage in business other than that expressly authorized in its charter of the law under which it may have been or hereafter may be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business.

Section 4555, Revised Statutes of Missouri, is merely declaratory of the Constitution:

> " * * * No corporation shall engage in business other than that expressly authorized in its charter, or the law under which it may have been or may hereafter be organized."

As early as 450 B.C., the laws of the Twelve Tables (Table VIII) recognized this theory inherent in the law of corporations. Gaius, l. IV ad XII Tab. (D. 47, 22, 4):

> "His (sodalibus) potestatem facit lex (XII Tab.), pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant; sed haec lex videtur ex lege Solonis translata esse."

While this law was obviously taken from a law of Solon, the Romans were even more modern in thought than this basic law declared for they ordained all corporations to be illegal if they did not owe their conception to either the Senate or the Emperor. (Kent's Comm., Vol. 2)

The modern reasons underlying this principle are two: First, because a corporation, being a creature of law, created by law, must, of necessity, have only those powers expressly or impliedly granted by the creator; and secondly, because the stockholders of the corporation have only contracted to make themselves liable for the authorized acts of the corporation, and have not assumed liability for acts ultra vires the corporation. It is, of course true that a corporation is <u>capable</u> of exceeding its charter powers (though not in the sense of right), and it cannot always set up its want of power to escape liability either ex delicto or ex contractu. Fletcher "Cyclopedia Corporations".

II

<u>A bank incorporated in Missouri has no power to engage in the business of writing insurance</u>

Disraeli once said, "A precedent embalms a principle". That this is so is nowhere more clearly demonstrated than in this discussion, for the principle of corporate law referred to in the first part of this opinion is as well preserved today as it was

when it sprang with full vigor from the minds of the ancient Greeks.

> "The settled rule is that a corporation possesses only such powers as are expressly or fairly implied in the statute by or under which it is created; that the enumeration of these powers implies the exclusion of all others; and that any ambiguity or doubt respecting the possession of any particular power arising out of the terms used in the statute is to be resolved against its possession. This rule is fully ..nized in the State of Missouri. .. ex rel. v. Lincoln Trust .. 4 Mo. 562, 46 S.W. 593; .. Hotel Company v. Lowe Fu.. ure Co., 75Mo. App. 135."
>
> Richard Hanlon Millinery Co. v. Mississippi Valley Trust Company, 158 S.W. 359, l.c. 363.

At this juncture, it may be well to call attention to the statutes to which banking corporations owe their origin. Section 5354, Laws of Missouri, Extra Session 1933-34, page 137, defines the rights and powers of banks incorporated in this state. It would be useless in this discussion to set out the entire statute. Suffice it to say that only in sub-section 7 is there any mention of the power of a bank to act as agent for a corporation. This provides:

> "Every corporation shall be authorized and empowered:
>
> * * * *
>
> (7) To act as fiscal agent of the United States, of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money and receive and deliver certificates of stocks, bonds, and other evidences of indebtedness."

By no conceivable stretch of the imagination can this be construed as authority for a bank to engage in the business of writing insurance as an agent or broker. If, therefore, a bank be permitted this right, it must be by reason of implied powers possessed by banking corporations generally.

> " * * * ' a power is implied when reasonably necessary to enable the corporation to accomplish the objects of its creation', provided always, of course, that those objects are such as are recognized and permitted by the charter granting power. Furthermore, any particular act, to be justified under implied power, must be 'directly and immediately appropriate to the execution of the specific powers granted by the charter and not bear a slight or remote relation to them.' 2 Fletcher Cyc. Corp., pp. 1768 and 1770, pars. 793 and 795."
>
> State ex rel. Barrett v. First Nat'l. Bank, 297 Mo. 397.

The words "banking powers" were, in the case of Reed v. People, 125 Ill. 592, construed to mean such powers as are ordinarily conferred upon and used by the various banks doing business in the country. "The words 'general banking powers' are to be used in their common and ordinary sense. The ordinary and usual powers exercised by banks in doing general banking business are to loan money, to discount notes, receive deposits, and deal in commercial exchange." Knass v. Madison and Kedzie Bank, 354 Ill. 554. In that case the Court also said anent the powers of a banking corporation:

> "Enumeration of powers granted implies exclusion of all others, and any ambiguity in the terms of the grant of power must operate against the corporation and in favor of the public. If a power claimed is withheld, the withholding of such power is to be regarded as a prohibition against its exercise. (Calumet Dock Co. v. Conkling,

> 273 Ill. 318; Fitze v. Equitable Building & Loan Society, 186 Id. 183; American Loan & Trust Co. v. Minnesota & Northwestern R.R. Co., 157 Id. 641; Fridley v. Bowen, 87 Id. 151). Other courts hold the same view. California Bank v. Kennedy, 167 U.S. 362; Weckler v. First National Bank, 42 Md. 581."

In the case of Weekler v. First National Bank, 42 Md. 581, the question was before the court as to the power of a bank to sell bonds for third parties on commission. The words of the court are so appropriate to this opinion that we set them out in extenso:

> "The mode in which the incidental powers may be exercised is not defined, but all incidental powers which they can exercise must be necessary or incidental to the business of banking, thus limited and defined. To the usual attributes of banking, consisting of the right to issue notes for circulation, to discount commercial paper and receive deposits, this law adds the special power to buy and sell exchange, coin and bullion, but we look in vain for any grant of power to engage in the business charged in this declaration. It is not embraced in the power to 'discount and negotiate' promissory notes, drafts, bills of exchange and other evidences of debt. The ordinary meaning of the terms 'to discount' is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable. The power 'to negotiate' a bill or note is the power to endorse and deliver it to another so that the right of action thereon shall pass to the endorsee or holder. No construction can be given to these terms as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission or engage in business of that character. The appropriate place

> for the grant of such a power would be in the clause conferring authority to 'buy and sell', but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, expressio unius est exclusio alterisu, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such a business is prohibited to these associations. Nor can we perceive it is in anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond-brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country. The more carefully they confine themselves to the legitimate business of banking, as defined in this law, the more effectually will they subserve the purposes of their creation. By a strict adherence to that, they will best accommodate the commercial community, as well as protect their shareholders.
>
> * * *
>
> "We are therefore clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defense of ultra vires is open to the appellee." (Emphasis ours).

It is apparent that a corporation of this kind is created for a more limited and special purpose than is a corporation organized under the general statutory charter for the purpose of conducting ordinary business. Divide County v. Baird, 212 N.W. 236. The nature of the business and its relation to the fiscal affairs of the State and Nation make it a business especially subject to regulation. "These regulations and limitations are intended primarily to safeguard the rights of depositors, but also rest upon the broader basis that the public welfare and the stability of public business and commercial regulations depend to a great extent upon honesty and soundness in the banking business. They should, therefore, be construed with reference to such purposes." Fletcher Cyclopedia Corporations, Vol. VI, p. 274.

It has been represented that, in most instances, an executive officer of a bank holds the license to carry on the business of writing insurance either as agent or as a broker. However, banking corporations, like all others, can act and do business only through their officers and agents. "Officers of a bank have authority to act in accordance with the general usage, practice and course of their business, and when thus acting, they bind their bank in favor of third persons, who have no knowledge of any narrower limitations of their power." Fletcher Cyclopedia Corporations, Vol. II, page 233.

We have shown that a corporation may become liable to third parties, either ex contractu or ex delicto, especially where the authority on the part of officers or agents to engage in ultra vires transactions in the name of the corporation has emanated from the stock-holders or directors. While we do not intend, in this opinion, to extend our remarks to the question of the extent of liability involved in undertaking the business of writing insurance either as agent or as a broker, nevertheless, some liability is attached thereto.

For a particular undertaking to be against public policy, actual injury need not be shown. "It is enough if the potentialities for harm are present." Porter v. Trustees of Cinn. Southern Ry., 97 Ohio St. 29,33, 117 N.E. 20. Ulman v. Fulton, 97 A.L.R. 1170, l.c. 1178.

In concluding the discussion of this question, we respectfully refer to the case of Downing v. Lane County State & Savings Bank, 290 P. 236:

> "It was not within the scope of Bergman's authority, as executive officer of the banking corporation, to invest and loan money for the bank's depositors with their consent so as to make the bank liable for the acts of its executive officer. The bank's executive officer represents the bank in transacting its business. The scope of his duties does not include that of acting as broker for others. In investing and reinvesting the funds of plaintiff, Bergman was acting for her and not for the bank. There is no pretense that Bergman charged any commission, fee or remuneration in favor of the bank for his services. That it was not within the scope of his authority as executive officer to act for the depositors of the bank as a broker is well established by the following

authorities: In re Assignment of Bank of Oregon, 32 Or. 84, 88, 89, 51 P. 87; Shute v. Hinman, 34 Or. 578, 56 P. 412, 58 P. 882, 47 L.R.A. 265; Byron v. First Nat. Bank, 75 Or. 296, 299, 146 P. 516; Verrell v. First Nat. Bank, 80 Or. 550, 555, 157 P. 813; Doerstler v. First Natl. Bank, 82 Or. 92, 100, 161 P. 386; Haines v. First Natl. Bank, 89 Or. 42, 48, 172 P. 505; Portland Bldg. Co. v. State Bank of Portland, 110 Or. 61, 66, 67, 222 P. 740; Miller v. Viola State Bank, 121 Kan. 193, 246 P. 517, 48 A.L.R. 373."

Further remarks are unnecessary, it being our opinion that the business of writing insurance contracts, either as agent or as broker, is entirely foreign to the general banking business, and that banking corporations incorporated in Missouri are without the power to engage in said business. The several factual situations outlined in your letter as to the methods of compensating the officer of the bank holding the license to write insurance craate, in point of law, in our opinion, distinctions without a difference, and our conclusion is the same as to all such situations: It may not be legally accomplished in Missouri.

III

Trust Companies incorporated under the laws of the State of Missouri may engage in the business of writing insurance as agent or as broker

A totally different question is presented in the discussion of the powers of trust companies and banks authorized to carry on the business of trust companies through separate trust departments. The reason underlying this distinction is, of course, to be found in the statutes supplying the life blood to these corporations. Whether it is a wise policy to grant this power to trust companies is, of course, a matter with which we do not and indeed, could not concern ourselves, as the wisdom, propriety and expediency of legislation is purely a matter for the Legislature.

Section 5421, Revised Statutes of Missouri, as amended by Laws of Missouri, Extra Session 1933-34, page 140, provides in part as follows:

> "Corporations may be created under this article for any one or more of the following purposes:
>
> * * *
>
> 7. To act as the fiscal or transfer agent of the United States, of any state, municipality, body politic or corporation and in such capacity to receive and disburse money, to transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness; and to act as attorney in fact or agent of any person or corporation, foreign or domestic, for any lawful purpose."

Sub-section 8 of Section 5354, heretofore referred to, grants to certain banking corporations the power to indulge in the added rights (to say nothing of liabilities) of trust companies. Our conclusions, therefore, with respect to trust companies, apply with equiparate force to these banks so qualified.

The State of Kentucky has a statute similar to Section 5421 of our laws. This section (606) provides in part that "any trust company * * * may act as agent or attorney for the transaction of any business or the management of estates * * *" The Court of Appeals of Kentucky, in construing this statute (Saufley v. Botts, 272 S.W. 408) said:

> "The words, 'and may act as agent or attorney for the transaction of any business,' are comprehensive. While followed by the words, 'or the management of estates,' etc., their use indicates that it was intended to give such corporations general authority to act as agent or attorney in matters aside from those specifically mentioned.
>
> * * *
>
> "However, the authority to act as agent is a mere delegation of power and may be conferred upon trust companies generally under the section quoted, and also upon other corporations organized under the general provisions of the act, and, when similar language is used in each, the same construction applies to both."

The somewhat more recent case of Saufley v. Lincoln Bank & Trust Company, 275 S.W. 802, completely affirms this decision.

Our statute is even more comprehensive in terms than the Kentucky Statute. The power "to act as * * * agent of any person or corporation * * * for any lawful purpose" would seem to be a plenary grant, and to include all activities short of criminal ventures. The business of writing insurance as agent or broker could hardly be construed as being an unlawful purpose even though the quarterly premium does seem to be payable monthly. While it is true that a venture is not necessarily within the powers of a corporation merely because it is profitable, nevertheless, as respects a trust company writing insurance as agent or as broker, we must conclude that it is both,

IV

The Remedies

It would serve no useful purpose to set out at length the statutory provisions relating to agents or brokers violating the insurance laws. You, no doubt, are entirely familiar with these sections of our law. We content ourselves, therefore, with the observation that your powers are broad and comprehensive with respect to these licensees of your department. Sections 5892 and 5904, Revised Statutes of Missouri, 1929. The possibility of criminal prosecution as set out in Section 5730, Revised Statutes of Missouri 1929 is, of itself, sufficient, in our opinion, to cause agents and brokers to comply with our laws.

As to any banking corporation assuming powers unto itself that are without the scope of its charter, a certain, swift and expedient remedy, full and complete in effect, is to be found in Section 1618, Revised Statutes of Missouri:

> "In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the Attorney General of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at

the relation of any person desiring to prosecute the same; and when such information has been filed and proceedings have been commenced, the same shall not be dismissed or discontinued without the consent of the person named therein as the relator; but such relator shall have the right to prosecute the same to final judgment, either by himself or by attorney. If such information be filed or exhibited against any person who has usurped, intruded into, or is unlawfully holding or executing the office of judge of any judicial circuit, then it shall be the duty of the Attorney General of the state, or circuit or prosecuting attorney of the proper county, to exhibit such information to the circuit court of some county adjoining and outside of such judicial circuit, and nearest to the county in which the person so offending shall reside."

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

Ins.

4-21

April 20, 1936.

FILED
68

Hon. R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Mo.

Attention: Mr. P.B. McHaney

Dear Sir:

We have examined the attached proposed amendment to the charter of the American Automobile Fire Insurance Company, and in our opinion same is in proper form and in accordance with the Constitution and laws of the State of Missouri and of the United States.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

SCHOOLS: (1) Warrants may be issued only against the income and revenue of the current year, which includes back taxes which have no warrants against them.
(2) What constitutes income and revenue.
(3) Who can stop payment on warrants.

May 11, 1936. 6-15

FILED 68

Mr. Kenneth Ogle,
West Plains,
Missouri.

Dear Sir:

We have your letter or recent date, which reads as follows:

"We have in this county several warrants which are in my way of figuring for more than the revenue for the year in which they were written. For instance, a district writes warrants to a teacher for more than the state aid, railroad and telegraph, county interest, township interest and the levy for the year times the valuation.

"I would like to get your interpretation of section 9233 of the 1933school law. I am especially interested in the interpretation of 'income and revenue' as used in this section.

"Can a school board legally issue warrants against taxes which are due the district for years prior to the current school year providing there are no outstanding warrants against these back taxes?

"In other words, is the county treasure allowed to cash warrants on a district when the warrants for the school year 1931-1932 (teacheres fund) were for more than the state aid, local tax, and the other sources provided by law? These items of revenue amounted to $573.80. Will all back taxes which were on the books at the time these warrants were written be applied toward payment of warrants in excess of $573.80 for the year 1931-32.

"Can I as County Superintendent stop payment on warrants which have been written to a company that was not registered with the Secretary of State at the time the warrants were written? Is the representative of such company who endorses these warrants personally liable in case the district refuses to pay?"

I.

It is a settled rule in Missouri that a school district cannot write warrants for more than the income and revenue for the year. Sec. 9233 R. S. Mo. 1929, states:

> "No county or township treasurer shall honor any warrant against any school district that is in excess of the income and revenue of such school district for the school year beginning on the first day of July and ending on the thirtieth day of June following;* * *."

The rule is laid down by implication in Jacquimin v. Andrews, 40 Mo. App. 507, wherein the court held that,

> "If the directors limit their drafts for any school year on this fund to the amount thereof derived from all sources for that year, it is not believed that because there is no money in the fund at the exact date of any warrant, and they knew this fact, this would be such an unauthorized exercise of power as to make them personally liable for the amount of the warrant so drawn. For aught that appears by the petition in this case, there may have, subsequently to the date of said warrant, come into the hands of the county treasurer money of this fund out of which the same could have been paid.* * *"

II.

The second question concerns the interpretation of income and revenue as used in Sec. 9233, supra.

In Sec. 9312 R. S. Mo. 1929, is set forth the fund to which the income is to be applied and thereby sets forth that constitutes income and revenue.

> "The warrants thus drawn* * *shall be signed by the president of the board and countersigned by the district clerk.
>
> "The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages,

> and all tuition fees, shall be placed to the credit of the 'teachers' fund;' the money derived from taxation for incidental expenses shall be credited to the 'incidental fund;' all money derived from taxation for building purposes, from the sale of school site, school house or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the 'building fund;' and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall be placed to the credit of the 'teachers' fund' of such school district."

Included in "may hereafter be received by such school district" are Sec. 9959, overplus in rate of real estate for taxes; Sec. 9007, penalty of utility company on its failure to make statement of property owned; Sec. 10029, taxes from railroad.

III.

The third question is to whether teachers' warrants can be drawn on back taxes of years which have no warrants outstanding against them.

Sec. 9312 R. S. Mo. 1929, says in part:

> "*** and all moneys not herein specified that now belong to any school district or that may hereafter be received by such school district shall be placed to the credit of the 'teachers' fund' of such school district."

As to the disposition of this money, in State v. Bowman, 294 S.W. l.c. 108, the court held:

> "The evidence showed that $927.35 was received by the district from railroad taxes, and the sum of $317. remained in the treasury from the year 1925. This money would go by law only to the teachers' fund."

Therefore, if the taxes have been paid and the cash is in treasury, then teachers' warrants may be written against them.

If the taxes have not been collected, but are still delinquent, then the question takes on a different aspect. It becomes now the inquiry as to whether it can be reasonably anticipated that the delinquent unpaid taxes will

be collected that year so that warrants may be written against them. The cases dealing with the right of a school district to anticipate revenue are few; the vague case of Jacquinin v. Andrews quoted above, being one in which the point is actually discussed. We are forced therefore to refer to decisions on similar provisions of the law of Missouri, in order to obtain the viewpoint and reasoning of the court in such analogous situations.

As the court in State v. Woodson, 126 Mo. 497, says:

> "Statutes on cognate subjects may be brought within the range of the construing vision as needed auxiliaries in the work of interpretation."

See also Sutherland on Statutory Interpretation §443.

Article 10, Section 12 of the Constitution of Missouri reads as follows:

> "No county, city, town, township, school district or other political corporation * * * shall be allowed to become indebted in any manner or for any purpose to any amount exceeding in any year the income and revenue provided for the year."

The court in Holloway v. Howell County, 240 Mo. 601, states the purpose of Constitutional provision:

> "The theory of our present system of county government is that counties must run their business affairs on the 'cash system'. Running in debt is easy and pleasant while it lasts. Paying is 'another story.'"

The pleasure of debt making is denied by law to Missouri counties, they can anticipate their revenue but only for the current year.

In Book v. Earl, 57 Mo. 246, the court says:

> "The evident purpose of the framers of the Constitution and the people who adopted it was to abolish in the administration of county and municipal government the credit system, and establish the cash system * * * by limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. * * * Under this section, the county court might anticipate the revenue collected and to be collected for any given year, and contract debts for ordinary current expenses which would be binding on the county to the extent of the revenue provided for that year."

Cited with approval, State ex rel. v. Johnson, 162 Mo. 621, and Trask v. Livingston County, 210 Mo. 582.

Judge Graves, in State ex rel. v. Hackman, 28 Mo. 686, l.c.699, clearly presents the point when he says:

> "Nor did we mean each debt should be met, but we did mean that during the fiscal year the cash would be available to meet the debt if the anticipated revenue was collected and rightfully disbursed. In other words, we have dealt with the matter upon the basis of a year's business and the term 'cash basis' has been used in the sense that the anticipated revenues of the year should at least equal the contracted debts of the year."

In Decker v. Diemer, 229 Mo. 296, the surplus funds of past years were accumulated and used to pay for a courthouse. These funds were, from all indications, cash, i.e taxes that had been collected. The court held that such use was a proper one.

Likewise, in State ex rel. v. Appleby, 136 Mo. 408, and Holloway v. Howell County, 240 Mo. 601, the excess funds out of which the warrants were to be paid were funds on hand and not outstanding taxes that were delinquent from past years.

In view of the above cases, it is apparent that the school district like the county is to be on a cash basis, and the right to anticipate the revenue is permitted only for convenience sake, and its use should be cautiously exercised, and its scope not broadened beyond the original allowances.

Taxes that have not been paid and are delinquent, from a logical and certainly even more so from a practical viewpoint, cannot be anticipated that they will be paid in the ensuing year. Taxes for the present year are unknown quantity and the presumption is that they will be paid. Once, however, the status of the tax has become known, i.e. by payment or default, then this presumption no longer remains, and if there is a failure of payment then there no longer remains grounds for anticipating payment.

IV.

The last question is whether a county superintendent may stop payment on a warrant issued to a book company not registered with the State Superintendent.

We refer you to Secs. 9458-9504, which read as follows:

"Sec.9485. Before the publisher of any school textbook shall offer the same for sale to any county school textbook commission or board of school directors in the state of Missouri, and at the time of the filing of such textbook in the office of state superintendent of public schools, said publisher shall pay into the treasury of the state of Missouri a filing fee of ten dollars for each book offered by said publisher. A series of books by the same author and upon the same subject shall constitute one book for this purpose. The fees thus received shall constitute a fund out of which, upon requisition made by the state superintendent of public schools, shall be paid the expenses of publishing lists and other information for the use of the county school textbook commissions, clerk hire and other necessary expenses in connection with the filing of all textbooks submitted for adoption in the state of Missouri. Any balance remaining in such fund shall be, upon the first of January of each year, placed to the credit of the general revenue fund of the state."

"Sec. 9504. Any publisher who shall sell, or offer for sale or adoption in this state, school textbooks of any kind without first obtaining license therefor under this article, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five hundred dollars and not more than five thousand dollars."

The County Superintendent cannot, however, stop payment on a warrant issued before the above law has been complied with. The warrant is signed by the president and the district clerk under Sec. 9312 R. S. Mo. 1929, and they are the ones to stop the payment on the warrant.

As to the liability of the representative of the book company, this is a personal matter on which we cannot pass.

CONCLUSION.

It is, therefore, our opinion that the county cannot write warrants in excess of the taxes and other income of the district. That income

and revenue in Sec. 9233 R. S. Mo. 1929, are explained by the sources mentioned in Sec. 9312 R. S. Mo. 1929.

That back taxes, if collected, against which there are no warrants may be applied to the payment of teachers' salaries. If not collected, but still outstanding, then warrants cannot be issued against them. That a county superintendent cannot stop payment on a warrant, it being the duty of the president and district clerk.

Respectfully submitted,

J. E. TAYLOR
Assistant Attorney-General

JET/LB

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

PENAL INSTITUTIONS: Void orders of a Court have no legal force in determining the place of imprisonment.

May 29, 1936.

5/29

FILED
68

Mr. W. M. Oakerson
Chief Clerk
Board of Pardons and Paroles
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 21, 1936, which reads as follows:

> "We have a girl at Chillicothe, Missouri, named Evelyn Lambert. In the January term of the Circuit Court of Cape Girardeau County, and on January 6, 1936, her commitment papers show that she was sentenced to 'two years in the State Penitentiary', and on the same date the commitment papers show the following order:
>
> " 'That on account of defendant being eighteen (18) years of age, she, the said defendant be confined in the Industrial Home for Girls at Chillicothe, Missouri.'
>
> "This girl was received at Chillicothe under the above commitment on January 9, 1936, but since then has shown herself to be incorrigible and she repeatedly tries to run away and induce other girls to run away with her. She was eighteen years old when her offense was committed. She is now nineteen years of age. She is a very disturbing element among other inmates and has threatened violence to the officers.
>
> "In the April term of the Circuit Court of Cape Girardeau County, on May 13, 1936, the Court made an order that

'Evelyn Lambert be removed from the Industrial Home for Girls and that she be confined in the Missouri State Penitentiary to serve the balance of her sentence.'

"Under the original commitment and subsequent order of removal, would it be legal to transfer the girl to the Penitentiary?

"If said original commitment and order of removal do not legally authorize a transfer, pleas advise what procedure can be taken in order to effect her transfer in a legal way."

Section 8364 R. S. Mo. 1929, pertains to the State Industrial Home for Girls and specifically designates the Court's jurisdiction to commit persons to the institution. We quote a part of said section.

"All commitments to the industrial home for girls of girls, over the age of twelve and under the age of eighteen shall be made by the juvenile juvenile division of the circuit court.* * * *".

Cape Girardeau County is a county of less than 50,000 inhabitants. Section 14162 R. S. Mo. 1929, provides in part as follows:

"The Cape Girardeau court of common pleas and all circuit courts in counties less than 50,000 population shall have original jurisdiction of all cases coming within the terms of this article. The proceedings of the court in such cases shall be entered in a book or books kept for that purpose, and known as the juvenile records, and the court shall be known as the Cape Girardeau court of common pleas and the circuit court, and may for convenience be called the juvenile court. The clerk of the Cape Girardeau court of common pleas and the clerk of the circuit court in such counties, shall act as the clerk of the juvenile court."

In the case of State v. Gregori 318 Mo. 998; 2 S.W. (2d) 747, l. c. 749, our Supreme Court said:

> "Suffice it to say, whether it is a division of the circuit court or a separate and distinct tribunal, it is contemplated that only children, subject to the provisions of the act, are to be cared for or proceeded against therein, for it is limited to children coming within its scope.
>
> "The juvenile Court Act, so called, subjects to its jurisdiction only minors under a certain age. Jurisdiction over others beyond the age limit prescribed by the act is by implication denied. The question before us is not the right to try a child within the age limit in the juvenile court for crime, but the jurisdiction of the juvenile court, relative to a criminal charge, over another without the age limit. As we have ruled, the Juvenile Court Act applies to children 16 years of age and under, that is, under the age of 17 years. As defendant was 17 years of age, the juvenile court was without jurisdiction to try him. His status remained that of any other citizen, to be tried by the court having jurisdiction of criminal offenses. Section 2436, Revised Statutes 1919, provides:
>
> > 'The circuit courts in the respective counties in which they may be held shall have power and jurisdiction as follows: First--as courts of law, in all criminal cases which shall not be otherwise provided for by law.'
>
> "We know of no enactment otherwise providing for a court to try a person, 17 years of age, for murder

in the first degree. Defendant, 17 years of age according to the record, was not subject to the jurisdiction of the juvenile court, and that court could not try him."

CONCLUSION.

We are of the opinion that the provisions of Section 14162, supra, were not available to prisoner, Evelyn Lambert, allowing the Circuit Court discretion to try her in the Juvenile Division of said Court. Under the Gregori case, supra, her age precluded consideration of her case in Juvenile Court. We are of the opinion that under the provisions of Section 8364 R.S. Mo. 1929, supra, no person can be legally committed to the State Industrial Home for Girls, except pursuant to a hearing in the Juvenile Division of the Circuit Court, or a Juvenile Court.

The certified copy of the judgment and sentance upon which said prisoner is now held in the Industrial Home for Girls, which you submitted with your request, shows on its face that the proceedings had against Evelyn Lambert were in the Circuit Court of Cape Girardeau County, and that she was prosecuted under the general laws of this State prohibiting and punishing for carrying concealed weapons. Such being the fact, the Circuit Court's sentence to two years in the State Penitentiary is a governing binding sentence in her cause. That portion of the commitment which speaks of confinement in the State Industrial Home for Girls is a Court Order rendered beyond the jurisdiction of the Circuit Court in such cases made and provided. It should be treated as mere surplusage and should be disregarded by the Penal Board.

We are of the opinion that Evelyn Lambert should be delivered and booked in the State Penitentiary under the commitment now in the State Penitentiary under the commitment now in the hands of the Penal Board.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

INSURANCE DEPARTMENT: Approval of Declaration and Articles of Association of Cooperative Casualty Co.

7/1

July 1, 1936.

FILED
68

Honorable R.E. O'Malley,
Sup't. of Insurance Dep't.,
State of Missouri,
Jefferson City, Mo.

Dear Sir:

This is to acknowledge receipt of your letter of July 1, 1936, as follows:

> "You will find enclosed the Declaration and proposed Articles of Association together with the Affidavit of Publication of the same, in connection with the proposed formation of the Cooperative Casualty Company, a mutual company. This company is being formed under the provisions of Article 7, Chapter 37, Revised Statutes of Missouri, 1929.
>
> "Will you please inform us whether or not the said Declaration, Articles of Association and Affidavit of Publication are in accordance with the provisions of Article 7, Chapter 37, Revised Statutes of Missouri, 1929, and not inconsistent with the Constitution and laws of this state and of the United States?"

We have examined the enclosures appended to your letter relating to the Cooperative Casualty Company, a Mutual Company, and it is our opinion that said documents are in accordance with the laws of the State of Missouri and of the United States, and are not

inconsistent with the Constitution and laws of this State, and the Constitution and laws of the United States.

We are returning herewith the Declaration and proposed Articles of Association and Affidavit of Publication of said company.

Respectfully submitted,

James L. HornBostel,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

INSURANCE DEPARTMENT - Mutual Eife Insurance Co. incorporation papers approved.

7/21

July 21, 1936

FILED
68

Mr. R. E. O'Malley
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your letter of July 21, with reference to the Mutual Life Insurance Company of Missouri.

We have examined the declaration of intention and the proposed charter of said Company, as well as the published notice and filing of said declaration, and find the same to be in accordance with the provisions of Article II of Chapter 37 Revised Statutes Missouri 1929 and not inconsistent with the Constitution and laws of this State and of the United States.

Yours very truly,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

RESIDENCE: (1) Person's residence is a matter of intention to be determined by such person's acts and utterances;
(2) City of St. Louis cannot return persons requiring institutional care to alleged legal residence when such person has evidenced an intention by acts and utterances to become a resident of the City of St. Louis.

July 25, 1936.

8-6

FILED
68

Mr. E. C. O'Brien, M.D.
Assistant Commissioner
City of St. Louis
Hospital Division
202 Municipal Courts Building
Saint Louis, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "We are asking for an opinion as to the legal residence, and what steps this Department may take in order to return a person requiring institutional care to that legal residence.
>
> "In our dealings with other states regarding the return of such cases, we have certain rules: one year's residence (same as for voting), not a public charge during that time; wife's residence is the same as husband's, as also is the children's residence, etc.
>
> "Specifically, we have in our City Hospital, a Mr. Robert Van Hoy, Active Tuberculosis, born Sparta, Missouri, 1888, divorced, lived at Joplin till 1930 and on a farm in Anderson (McDonald County) till June, 1935, when he came to Saint Louis to live with a sister. In August, 1935, he became a patient here in Saint Louis after two month's residence. A letter to Mr. Wayne Maness, Clerk of the County Court, McDonald County, Pineville, Missouri, stating these facts, and requesting authority to return the patient to the care of McDonald County, brought the answer copy of which is attached herewith.
>
> "The request, as you see, was refused for no valid reason. This is but one of the

> many cases we have to contend with in Saint Louis, and we therefore ask, whether in a case of this kind, it is lawful for Saint Louis to send such patients via our ambulance back to their legal residence, on prior notification to the sheriff, to whom we will turn the patient over."
>
> "May we have your opinion as soon as possible?"

In the course of this opinion, we shall first determine the question as to the legal residence of a person, as such residence may apply to your instant inquiry.

The question of residence is largely to be determined by some act or acts in conformity with an intention of the party whose residence is in question.

In the case of Johnson v. Smith, 43 Mo. loc. cit. 501, the Court said:

> "****a man's domicile is where he has fixed his ordinary dwelling, without a present intention of removal, ****".

In discussing one's mental attitude, the Court in State ex rel. Ramey v. Dayton, 77 Mo. loc. cit. 682, said:

> "**** The physical act of staying must be accompanied with the mental determination of making a home or domicile in the place where the party stays or abides.***"

In the case of In re Lankford Estate, 272 Mo. loc. cit. page 9, the Court stated:

> "Residence is largely a matter of intention. (Lankford v. Gebhart, 130 Mo. 621.) This intention is to be deduced from the acts and utterances of the person whose residence is in issue. ****."

In Trigg v. Trigg, 41 S. W. (2d) loc. cit. 589, the Court said:

> "**** We hold in accord with the general expression of the law that residence is largely a matter of intention evidenced by some act or acts in conformity with such intention. ****".

You will note from the above quetations that a person's residence is a matter of intention evidenced from the acts and utterances of the person whose residence is in issue.

Your attention is directed to Section 12950, R. S. Mo. 1929, relating to county's liability to support the poor. It reads as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 12952, R. S. Mo. 1929, relating to who is deemed an inhabitant, reads as follows:

> "No person shall be deemed an inhabitant within the meaning of this article, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such poor person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

Section 12951, R. S. Mo. 1929, defining who is a poor person, provides:

> "Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Section 12953, R. S. Mo. 1929, relating to the duty of the county court to provide for the support of the poor, reads as follows:

> "The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

It is evident from the above statutes that poor persons shall be relieved, maintained and supported by the county of which they are inhabitants. The aged, infirm, lame, blind or sick persons who are unable to support themselves shall be deemed poor persons within the meaning of the law.

Section 12952, supra, very plainly states that no person shall be deemed an inhabitant within the meaning of this article, who has not resided in the county for a space of twelve months next preceding the time of any order being made respecting such poor person. It further becomes the duty of the county court of each county, on the knowledge of the judges of such tribunal, or any of them, or upon information of any justice of the peace of any county in which any person entitled to the benefit of the provisions of this article resides, to provide at the expense of the county for the relief, maintenance and support of such person.

Your particular attention is directed to Article 4, Chapter 46, Section 8686, R. S. Mo. 1929, relating to the State Sanatorium and its free patients. It provides in part as follows:

> "****Each person desiring free treatment at said sanatorium shall apply under oath to the county court in which he or she may reside, and if a resident of the city of St. Louis, to the comptroller of said city, who shall at once certify the said name of said applicant to the superintendent of said sanatorium for the admission and treatment of such person, which certification shall be filed and recorded in a book kept by the superintendent in order of their receipt. Admission to the sanatorium shall be in order in which the names of the applicant appear on the record book so kept by the superintendent. *****"

You will note that the Comptroller of the City of St. Louis shall at once certify the name of any such applicant, who shall apply under oath to the county court in which he or she may reside, to the Superintendent of said Sanatorium for admission and treatment of such person.

There are no provisions under our laws whereby the City of St. Louis could send any patient via their ambulance back to their legal residence on prior notification to the



sheriff to whom such patient shall be turned over.

CONCLUSION.

In light of the above, it is the opinion of this department that, since the person whom you have mentioned in your request for an opinion, and from the facts accompanying your request that such person left McDonald County in the State of Missouri for the purpose of fixing his future residence in the City of St. Louis, Missouri, and that such a person is a legal resident of the City of Saint Louis, Missouri.

We further conclude that you may not send such patient, as you have mentioned in your request, via your ambulance back to his or her alleged legal residence.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

RCS/afj

INSURANCE DEPARTMENT - Approval of Incorporation papers - Central Surety Fire Corporation.

7-29

FILED
68

July 29, 1936

Mr. R. E. O'Malley
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

In reply to your letter of July 20, we have examined the declarations of intention together with the articles of incoporation and affidavit of publication in connection with the incorporation of the Central Surety Fire Copporation, and find same to be in accordance with the provisions of Article IV, Chapter 37, Revised Statutes of Missouri 1929, and not inconsistent with the Constitution and laws of this State and of the United States.

Respectfully submitted,

JOHN W. HOFFMAN,
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

August 13, 1936

8-13

FILED
68

Hon. R. E. O'Malley
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

We have examined the inclosed minutes of the meetings of the stockholders and directors of the American Covenant Life Insurance Company, whereby said stockholders and directors are seeking to increase the amount of outstanding capital stock from $25,000.00 to $35,000.00.

We find these documents to be in proper legal form and in accordance with the statutes of the State of Missouri governing the increase of capital stock by a corporation.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

INSURANCE: Joint stock companies doing business under Sec. 5793, R. S. Mo. 1929 may not issue participating policies.

August 14, 1936.

FILED
68

Original file copy lost. This supplemented

Honorable R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of July 9, requesting an opinion as to the following:

> "* * * May a joint stock insurance company, organized or licensed to transact business under the provisions of Article 6 of Chapter 37, Revised Statutes of Missouri, 1929, issue a participating policy covering risks that may, under the provisions of this article, be the subject of insurance? * * * * "

Section 5796 of Article VI, Chapter 37, Revised Statutes of Missouri, 1929, provides in part as follows:

> "Corporations may be formed for the purpose of doing business mentioned in the first class or division named in Section 5793 either on the stock or mutual plan and for the purpose of doing the business mentioned in the second and third classes or divisions on the stock plan * * * * ; and it shall not be lawful for any corporation so formed to do business on any other plan than that upon which it is organized * * * ;"

The Legislative intent is thereby made clear. Corporations organized for doing business under the first class named in Section 5793 must be formed either on the stock or mutual plans, and not both, and corporations formed for doing business under the

second and third classes must be formed only on the stock plan. We believe that the General Assembly intended that corporations doing business on the stock plan should be corporations owned and controlled entirely by the stock-holders and in neither the management nor the profits of which the policy-holders participate.

While it is true that our laws relating to life insurance permit the issuance of participating and non-participating policies, that principle does not apply as well to fire insurance companies, and the reason therefor "may be that while science has conquered the terrible plagues and epidemics of the past and has made human life more stable than it ever was before, science has not yet been able to devise a means against devastating conflagrations * * * " General Insurance Co. of America v. Hamm, 57 P. (2d) 671. We are therefore of the opinion that by reason of Section 5796, R.S. Mo. 1929, a joint stock company doing business under Sec. 5793 may not issue participating policies of insurance, and the opinion of the former Attorney General dated April 30, 1929 is erroneous and hereby overruled.

There is another reason, however, and a more important reason from the viewpoint of public policy why these joint stock companies doing business under Section 5793 may not issue participating policies, and that is because such companies are subject to the fire rating law of this state, Article VIII, Chapter 37, Revised States of Missouri, 1929, and for such companies to issue participating policies would disturb the rate filings of these companies and would constitute a positive violation of the spirit and letter of our law.

There is no question but that the businessof insurance is so far affected with the public interests as to justify legislative regulation of its rates. In the case of German Alliance Insurance Company v. Lewis, 233 U. S. 389, Mr. Justice McKenna said:

> "It is manifest that the rates of insurance which it becomes necessary for insurance companies to charge depend upon the premiums received and losses sustained by them; to the end that insurance rates shall operate equitably, the Legislature has * * * * provided against discrimination. It is important both to preserve the solvency of insurance companies and for the equitable application of the rates charged for insur-

> ance, that such rates shall be determined upon scientifically."

In the recent case of General Insurance Company of America v. Hamm, decided by the Supreme Court of Wyoming May 5, 1936, the precise question here involved was passed upon by that Court. The Insurance Commissioner of Wyoming had taken the position that a stock company had no right to issue a policy providing for the participation in the earnings of the company. The Court, after sustaining the position of the Insurance Commissioner on statutory grounds, said:

> "* * * * The judgment must be reversed for another reason, Subdivision 9 of Section 57-216, Rev. St. 1931, provides that 'Any variation of any company or insurer from the schedule of rates established and maintained by the bureau which it maintains, or of which it is a member, shall be uniform in its application to all of the risks in the class for which the variation is made ' etc.
>
> "The provision was under consideration by the Supreme Court of Ohio in the case of General Insurance Co. et al v. Bowen, 130 O.S. 82, 196 N. E. 774, in which the plaintiff in this case was one of the plaintiffs. It wrote, in the State of Ohio, a policy which in effect was a one year policy, at the same annual rate as a straight five-year policy, thus reducing the cost thereof. The court held that this resulted in a different annual rate for the same risk or similar risks in the same class in violation of the law providing that any deviation 'shall be uniform in its application to all of the risks in the class for which the variation is made.' The result in that case would follow in this, if participating policy-holders were to receive what would substantially be a rebate from a participating fund, a rebate which would not apply to other policies. We think that the holding of the Ohio court should be applied here.

"We need not determine whether or not a different rule should apply in case the plaintiff would issue all of its policies in this state as participating policies. The petition alleges merely that plaintiff 'is now prepared to issue policies * * * to carry, on said policies, ' the endorsement mentioned in the statement of facts herein. Presumably it is now writing non-participating policies, and to leave the judgment herein stand would mean that the company could write one or the other as it pleased. That would violate the spirit of the law. We might say further, that on account of the uncertainty of the amount of any rebate on any policy, and the probable differences in amounts, if any, to be distributed in any one year, an inquiry might well be raised as to whether the uniformity contemplated by the statute could be effected under any such participating policy as the plaintiff proposes to issue. We need not, however, determine that point."

CONCLUSION

In viewof the foregoing, it is the opinion of this department that a joint stock company doing business under Section 5793, Revised Statutes of Missouri 1929 may not issue participating policies for the following reasons:

(1) Because it was the intention of the Legislature in enacting Section 5796, R. S. Mo. 1929, to prohibit such companies from issuing participating policies; and

(2) That such companies are subject to the fire rating law of this State, Article VIII, Chapter 37, R. S. Mo. 1929, and for such companies to issue participating policies would disturb the rate filing of such companies and would constitute a positive violation of the spirit and letter of the fire rating

law; and for the further reason that in view of the uncertainty of the amount of any rebate on any policy and the probable differences in amounts, it is doubtful if the uniformity contemplated by the statute could be affected.

Respectfully submitted

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

PEDDLERS: 1. Whoever shall deal in the selling of goods, wares and merchandise and go about from place to place to sell same is a peddler.
2. Drivers of trucks used in the dealing and selling of goods, wares and merchandise shall be licensed as peddlers
3. No 2 or more persons shall deal or sell goods etc. under same license

August 21, 1936

8-25

FILED
68

Honorable J. R. Oliver
Clerk of the County Court
Dunklin County
Kennett, Missouri

Dear Sir:

This will acknowledge receipt of your request of August 18, 1936 for an opinion, which reads as follows:

> "We have in this county a number of merchants with business locations in towns who employ truck drivers to carry their merchandise over regularly established routes offering the same for sale, either for cash or for farm produce. The drivers of such trucks are paid a salary or daily wages for their services.
>
> "Others operating such trucks buy their merchandise direct from wholesale dealers, drive their own trucks and own no fixed place of business. Are these persons properly considered peddlers? Must the drivers of such trucks be licensed as peddlers, or should the owner of the business operating the trucks purchase peddlers license in his name?
>
> "If two or more such trucks are operated by the same person, must license be purchased for each truck so used?"

In your request, you have propounded three separate questions which will be disposed of by answering your first query, and in that respect your attention is directed to Section 13312, R. S. Mo. 1929 relating to certain persons declared to be peddlers. It reads in part as follows:

> "Whoever shall deal in the selling of * * goods, wares or merchandise,*by going about from place to place to sell the same, is declared to be a peddler."

The above quoted part of the statute is plain and contemplates that every person selling goods, wares and merchandise by going from place to place to sell same is declared to be a peddler. In the instant case, the fact that a number of merchants have business locations in towns and employ truck drivers to carry and sell their merchandise over regularly established routes offering the same for sale, would not take such truck drivers without the purview of Section 13312, supra. The mere fact that the drivers of these trucks are paid a salary or daily wage for their services would in nowise exempt them from the provisions of said section, as the statute specifically states that "whoever shall deal", contemplating that the person who takes the goods, wares or merchandise from place to place is a peddler, and such person must obtain a license.

In the case of City of Washington vs. Reed, 70 S. W. (2d), l.c. 122, the appellate court, in discussing who is deemed to be a peddler, said:

> "the peddler is usually thought of as a man with 'a pack on his back,' going from place to place, exhibiting his wares for sale and immediate delivery."

In the case of City of Aurora v. Stafford, 51 S. W. (2d) l.c. 548, the Springfield Court of Appeals, in discussing the term "peddler", as defined by Section 13312, supra, said:

> "The term 'peddler' in the statute * * should be given its meaning as it is ordinarily understood. A peddler is generally understood to be a person who carries his wares with him, and goes from house to house or place to place to sell them, and does sell and deliver them to each purchaser as he goes along, without any previous agreement relative thereto."

Section 13313, R. S. Mo. 1929, relating to the requirement of a license before one may deal as a peddler, provides as follows:

> "No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents or otherwise; and no peddler shall sell wines or spirituous liquors."

In the very early case of State vs. Thomas Downing, 22 Mo. App., l.c. 508, the appellate court, in interpreting what is now Section 13313, supra, said:

> " * the correct interpretation of section 6472, Revised Statutes, is that the license shall be issued to the person actually using it. That is, the individual peddling must have the license. * the doctrine of principal and agent, invoked by defendant, does not apply to this statute. It says no two persons shall deal under the same license, whether they be 'partners, agents, or otherwise.' It is equivalent to saying, no person shall peddle under the guise of being a partner or agent of one who may have a license. The statute contemplates that the peddler himself will have his license at all times ready for exhibition to any sheriff, collector, constable, or citizen."

Under the provisions of Section 13319, R. S. Mo. 1929, every person who is found to be dealing as a peddler, without having obtained a license to sell or deal as such peddler, and shall refuse to produce said license or permit to be read upon demand of any sheriff, collector, constable, or any citizen householder of the county, shall be deemed guilty of a misdemeanor.

CONCLUSION

In light of the above, it is the opinion of this department that:

1. Whoever shall deal in the selling of goods, wares and merchandise, and go about from place to place to sell same is a peddler.

2. Drivers of trucks used in the dealing and selling of goods, wares and merchandise shall be licensed as peddlers.

3. No two or more persons shall deal or sell goods, wares and merchandise under the same license.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:FE

SUPERINTENDENT OF INSURANCE: Fees of Referee as set forth in Section 5945, Laws of Mo. 1933, p. 65 are the only fees that can be allowed the Referee, and the statute cannot be waived.

11-30

November 28, 1936.

FILED
68

Honorable R.E. O'Malley,
Superintendent of Insurance,
Jefferson City, Missouri.

Attention: Mr. J.F. Allebach

Dear Sir:

This department is in receipt of your letter of November 27, which is as follows:

"R.E. O'Malley, Superintendent of Insurance, has filed a receivership action against the Missouri National Life Insurance Company, and the cause is pending in the Circuit Court of the City of St. Louis, Missouri.

"The Court appointed a referee pursuant to Section 5945, R.S. Mo. 1929, as amended by the Extra Session of the 57th General Assembly. The amended section is found in the 1933 Session Acts at page 65. This section among other things provides:

> 'The referee may be allowed for his services not exceeding $1.50 for each hour actually spent by him in hearing the testimony in the case, and for taking down the testimony and writing out the same in his report, not exceeding fifteen cents per each hundred words in his report, no pay or allowances whatever being made for exhibits or their contents, or for figures or numerals; and in addition to the above, he may be allowed a fee of not exceeding $100 for his services in making his report; besides these no other fees or allowances shall be taxed in favor of the referee or any one employed by him, and he shall pay his own clerk or reporter, if he employ one.'

"The referee appointed by the Court under the authority of this section has stated that he will

> not proceed as such referee for the meager compensation therein provided. Both the referee and counsel for the defendant indicated their belief that this section of the statutes could be waived by the parties to the action and a compensation higher than that provided by the statute could be paid. It should be borne in mind, of course, that any compensation paid to the referee would be paid out of the assets of the company as administration costs.
>
> "The Office of Superintendent of Insurance of the State of Missouri is a statutory office and he is proceeding against the company under authority given him by certain statutes. That being the case, we would like to know whether the Superintendent of Insurance has the power to waive the provisions of Section 5945 and to permit the payment to the referee of compensation higher than that designated in the statute, out of the assets of the company.
>
> "The Superintendent of Insurance, the company and the referee would like to have your opinion on this matter, and we would appreciate it if you could favor us with your opinion within the next day or two, if that will be possible."

The portion of Section 5945, Laws of Mo. (Extra Session 1933-34), which you quote with reference to the fees to be allowed the referee, also contains provision for the court or judge to

> "refer the hearing of the case to a referee, with power to hear the testimony and report his conclusions on the same to the court or judge. If the case is referred, the referee shall forthwith proceed to hear the same, and shall file his report within ten days after the conclusion of the testimony. Any referee failing to at once proceed with the hearing, or to file his report within the time aforesaid, may be removed by the court or judge, in which case he shall not receive any pay or allowance whatever for his services; and the court or judge may thereupon hear the case or appoint a new referee. The fees of the referee shall be taxed and paid as costs in the case."

The remainder of the statute with reference to the fees of the referee are set forth in your letter and will not again be quoted.

Briefly, your question is: Are the fees set forth in Section 5945, Laws of Mo. 1933, page 65 (Extra Session) the only fees that can be allowed to the referee, or can he be compensated in addition to the statutory fees? In other words, are the fees enumerated in the statute the only fees that can be allowed the referee, or can the terms of the statute be abrogated and he be given additional fees?

We think when a referee is appointed by the court to take and hear testimony and report his findings, he becomes an official of the court--a public officer--and he must look solely to the statutes for his compensation. The statute sets forth plainly and concisely the fees he is to receive, and it contains an express provision against additional fees, as follows:

> "besides these, no other fees or allowances shall be taxed in favor of the referee or anyone employed by him, and he shall pay his own clerk or reporter."

In the case of King v. Riverland Levee District, 218 Mo. App. l.c. 493, the St. Louis Court of Appeals offers the following general principles of law regarding fees of officers, which we think are applicable to the instant case:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. (State ex rel. Evans v. Gordon, 245 Mo. 12, l.c. 27, 149 S.W. 468; Sanderson v. Pike County, 195 Mo. 598, 93 S.W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S.W. 504) Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. l.c. 565, to the effect that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute and that if by statute compensation is

> provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. (State ex rel. Evans v. Gordon, supra)"

A further decision which we believe precludes the waiving of the terms of the statute is that of State ex rel. v. Gordon, 245 Mo. 12, wherein the Court said (l.c. 28):

> "Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and text-writers, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further, it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. (Throop on Public Officers, Secs. 446, 450; Shed v. Railroad, 67 Mo. 687, 690; Gammon v. Lafayette County, 76 Mo. 675; Williams v. Chariton County, 85 Mo. 645; Ford v. Railroad, 29 Mo. App. 616) Such statutes, too, must be strictly construed as against the officer. (Ford v. Railroad, supra, and Shed v. Railroad, supra)' (State ex rel. v. McCracken, 60 Mo. App. l.c. 656)"

CONCLUSION

Section 5945 provides for the fees of the referee to be appointed in accordance with the provisions of said section; it has definitely fixed the same and has emphatically stated that no other fees shall be allowed. We are of the opinion that the foregoing decisions preclude any referee appointed under the provisions of Section 5945, supra, from receiving compensation in any manner or mode other than as set forth in said statute, and that you, as Superintendent of Insurance, have no authority to waive the terms of said section.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:AH

SALARIES--FEES--COUNTY CLERKS: County Clerks shall account for all fees except two, and only receive salary fixed by 1933 Act.

December 16, 1936.

12-21

FILED
68

Honorable J. R. Oliver
Clerk of the County Court
Dunklin County
Kennett, Missouri

Dear Sir:

We acknowledge receipt of your inquiry which is as follows:

> "Section 11811, 1933, Statutes provide that 'The aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. . . . . in counties having a population of 30,000 and less than 70,000 persons the clerks shall be allowed to retain $2500.00 for themselves,. . . . . '.
>
> "Section 11781 sets out the fees of County clerks which is apparently allowed them under section 11811. The greater amount of fees earned by a County Clerk are provided for in other chapters of the Statutes and under articles other than those referred to in the aforesaid Articles.
>
> "The following sections include a number of those not mentioned in section 11781: 5048, 12891, 12886, 9085, 13563, 12874, 10879, 10171, 8253, 10106, 9117, 10086, 7955, 13492, 13519, for taxation fees, 9262, 9877 (1933 laws), 10007

(1933 laws) 10081 and 10111, 711, 8079 and 8194, 9945 (1933 Laws) and 9955 (1933 laws).

"I am particularly interested in the fee provided in Section 10081 and 10111 1929 statutes for assessing merchants and manufacturing companies in Counties under Township organization. They would seem to me to be non accountable fees inasmuch as they are earned by virtue of the fact that the County Clerk is an ex officio assessor in counties under township organization so far as his duties with reference to assessing merchants and manufacturing companies are concerned.

"Will you kindly advise which of the fees accruing under the above sections are non accountable?

Section 11812, Laws of Missouri, 1933, p. 371, refers to the deputies and their compensation in the circuit clerk's office, and states that every order permitting said clerk to appoint a deputy shall fix the compensation, etc., and "Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk."

Section 11814, R. S. Mo. 1929, insofar as it affects the county clerk, requires the circuit clerk to file with the county clerk a report of all fees charged and accruing to his office during such month, etc., and requires the circuit clerk to file with the county clerk duplicate receipts of the fees collected and paid the county treasurer. These sections do not designate any fee that may be charged by the county clerk for the doing of the things above set forth.

Section 11781, R. S. Mo. 1929, is the general fee statute authorizing the county clerk to make charges.

Section 12891, R. S. Mo. 1929, provides that the county clerk shall issue certain certificates with reference to wolf bounties, etc., and he "shall be entitled to a fee of fifteen cents, to be paid by the parties to whom the certificates are issued."

Section 12886, R. S. Mo. 1929, says the clerk "shall be allowed twenty-five cents for each affidavit" etc., with reference to bounties.

Section 9085, R. S. Mo. 1929, authorizes such clerk to collect certain fees under the article dealing with chiropody.

Section 13563, R. S. Mo. 1929, authorizes the clerk to collect certain fees for certificates of registration as to dental matters.

Section 12874, R. S. Mo. 1929, is a similar law with reference to the collection of dog tax.

Section 10879, R. S. Mo. 1929, provides that the county clerk shall receive certain fees for filing papers relating to drainage or levy districts, and for issuing subpoenas, etc.

Section 10171, R. S. Mo. 1929, has to do with allowances to the clerk for sending or conveying the returns of any senatorial election into any other county in the district as occasion may require, and also fixes the compensation "to any messenger who may be employed to convey the returns of any election required by law to be made to the secretary of state, at the rate of five cents per mile, going and returning."

Section 10106, R. S. Mo. 1929, has to do with peddlers' licenses and authorizes the county clerk to collect a fee of $2.00 for recording the license, etc.

Section 10086, R. S. Mo. 1929, as to merchants' taxes states the collector shall "at the time of delivering such license, collect the sum of fifty cents, the fee herein allowed to the clerk for issuing the same, and twenty-five cents each for the bond and statement to be retained by the collector as his fee for furnishing the same."

Section 13492, R. S. Mo. 1929, provides a fee of $1.00 for registration, filing and certificate as to nurses registering.

Section 13519, R. S. Mo. 1929, provides a fee for the registration of osteopathic physicians.

Section 10007, R. S. Mo. 1929, prescribes the fee allowed officers in the taxation and collection of the revenue.

Section 10081, Laws of Missouri, 1931, p. 360, provides certain fees to the county clerk with reference to the merchant's tax, and among other things provides

> "* * * * After the county board of equalization shall have completed the equalization of such statements, the clerk of the county court shall extend on such book all proper taxes at the same rate as assessed for the time on real estate, and he shall, on or before the first day of October thereafter, make out and deliver to the collector a copy of such book, properly certified, and take the receipt of the collector therefor, which receipt shall specify the aggregate amount of each kind of taxes due thereon, and the clerk shall charge the collector with the amount of such taxes; and such clerk shall receive as compensation for making such tax book, copy, filing statements, and certifying to same, the sum of six cents for each name or firm, one-half payable by the county, the other by the state. * * * *."

Section 10111, R. S. Mo. 1929, has to do with manufacturer's tax, and says that the county clerk shall receive as compensation for making the tax book, copy, filing statements, and certifying to same, the sum of six cents for each name or firm, one-half payable by the county, the other by the state.

Section 5048, R. S. Mo. 1929, prescribes a fee to the county clerk for recording a mark under the article on booming and rafting companies.

Section 7111, R. S. Mo. 1929, says that certain municipalities shall by ordinance fix compensation to the county clerk for certifying and transmitting an abstract of the property within towns made taxable for state purposes.

Section 8253, R. S. Mo. 1929, provides a fee to county clerks under the fish and game law, and has this further provision:

> * * * * which said fee of fifteen cents, paid to said clerks shall be retained by them for such services, and said clerks are not required to account for the same in their quarterly or annual statements of fees. * * * *."

Section 7955, R. S. Mo. 1929, provides a fee to the county clerk for issuing a permit to move a house.

Section 9262, R. S. Mo. 1929, provides compensation to the county clerk for every one hundred figures in the school tax column on the general tax book.

Section 9117, R. S. Mo. 1929, provides a fee to the county clerk for recording licenses from the State Board of Health.

Section 9877, R. S. Mo. 1929, provides compensation to the county clerk for making out the tax book.

Section 8079, R. S. Mo. 1929, provides compensation to the county clerk for issuing and attesting special tax bills, as does also Section 8194.

Section 9945, R. S. Mo. 1929, provides compensation for the county clerk for making the back tax book.

Your inquiry is not as to what fees the county clerk is entitled to charge, although the multiple of sections you have enquired about refer primarily to the authority of the county clerk, as such, to charge and collect such fees rather than the authority of the county clerk to retain, as his personal compensation, such fees when so collected. It by no means follows that the county clerk or other officers authorized to collect, or charged with the duty of collecting fees, is thereby authorized to retain as his own money or compensation such fees, when collected, and the above sections which you mentioned in your inquiry are referred to in this opinion in barest outline only for such little light as they throw upon the interpretation of section 11811, Laws of Missouri, 1933, p. 370, which in part provides:

> "* * * *in counties having a population of 30,000 and less than 70,000 persons, the clerks shall be allowed to retain $2500.00 for themselves, and shall be allowed to pay for deputies and assistants $3500.00; * * * *."

We assume that your county has a population between 30,000 and 70,000 people. This law passed in 1933 is a later expression of the legislative will than the statutes mentioned in your inquiry, and should be given full force and meaning. Every statute conferring upon an officer authority to collect a fee as his compensation should be strictly construed.

In the case of State ex rel. Troll vs. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this State says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed vs. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to foes is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute givesit. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

In the case of State ex rel. vs. Gordon, 245 Mo. 12, l. c. 27, the Supreme Court of this State declares as follows:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend

upon the amount or value of services performed, but is incidental to the office.

"Throop on Public Officers (Sec. 443) says: 'It has been often held, that an officer's right to his compensation does not grow out of a contract between him and the State. The compensation belongs to the officer, as an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office.'

"Mechem on Public offices and Officers says: 'Sec. 856. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot recover anything upon the ground of an implied contract to pay what the service is worth,' * * * * *

"In Bank v. Refrigerating Co., 236 Mo. 414, Brown, J., speaking for the court, says: 'When the law requires a specific service to be performed by a public officer, he must perform that service regardless of whether any provision has been made to pay him for same.'

"Not only is the right to compensation dependent upon statute, but the method or particular mode provided by statute must be accepted. On this point the Kansas City Court of Appeals says: 'It seems the general rule in this country, as announced by the decisions and textwriters, that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute. And further,

> it seems well settled that if the statute provides compensation in a particular mode or manner, then the officer is confined to that manner, and is entitled to no other or further compensation, or to any different mode of securing the same. * * * * *."

And at page 29 the Court says:

> "As the Legislature may fix such compensation to a public office as it sees fit, or none at all, we can see no constitutional objection to its attaching such conditions as it deems proper to the payment of the compensation, such conditions to be binding upon any one who thereafter enters upon such office and performs its duties. As stated above, the compensation has no relation to the amount or value of the service. There can be no application of the doctrine of quantum meruit. The officer takes the office cum onere. Having accepted it with the conditions imposed by the Legislature, upon whose will he must depend for any compensation at all, he cannot afterwards challenge the power of the Legislature to impose such conditions. * * * * *."

In the case of King vs. Riverland Levee District, reported at 279 S. W. 195, the Court says, l. c. 196:

> "It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office.* * * * * . Furthermore, our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. loc. cit, 656, to the effect that the rendi-

> tion of services by a public officer is to be deemed gratutious unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same."

There seems to be no doubt but what every fee authorized or collected by the county clerk under any of the foregoing sections should be turned into the county treasury, unless it be those authorized under Section 8253, R. S. Mo. 1929, and under Section 10171 R. S. Mo. 1929, the former of which specifically states that the clerk is not required to account for it in his quarterly or annual statement, and the latter of which is a statute more in the nature of provided expenses incurred by the party delivering the election returns, than it is in the nature of a fee statute, though it denominates such five cents primarily as compensation. The trite, and sometimes comprehensive and forceful expression that "A rose smells just as sweet by any other name" comes to our mind when arriving at the belief and conclusion that this latter section merly provides expense money for delivering the election returns, as in said section provided.

Section 11814, Laws of Missouri, 1933, p. 372, provides:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, * * * *."

The county court is a court of record and would seem to come within this statute. Said section further provides:

> "* * * *And quarterly such clerk shall pay into the county treasury the amount of any fees collected

in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for any fees collected and not accounted for by him as provided by law.* * *"

CONCLUSION.

It is our opinion that the county clerk of your county should collect all the fees authorized by the foregoing or any other statutes which provide for the collection of fees by him, but that none of those fees belong to him except those collected under the provisions of Section 8253 and Section 10171, and that it is his further duty to return all such fees and to account for such fees to the county, (the above last two sections excepted) and that bearing in mind the foregoing, that the county clerk's office is on a salary basis, the amount of which salary was fixed and determined by the 1933 Act of the Legislature above set forth.

Yours very truly

DRAKE WATSON
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

DW:H

DEAD BODIES: Schools and colleges within this state now incorporated, or hereinafter incorporated, teaching descriptive anatomy are entitled to receive dead bodies when complying with the provisions of Article 3, of Chapter 53, of R. S. Mo. 1929.

12/2.9

December 16, 1936

FILED
68

Dr. M. D. Overholser, Secretary
Missouri State Anatomical Board
Columbia, Missouri

Dear Dr. Overholser:

This will acknowledge receipt of your letter of recent date, requesting an opinion relative to our interpretation of the Anatomical Law.

> "The Hohenschuh-Carpenter College of Embalming, St. Louis, Mo., has made a request to the Board for dissection material. My letter of December 2nd to Dr. Schoemaker (copy enclosed) states that in my opinion the school is entitled to this material. Dr. Terry, in a letter to Dr. Schoemaker (copy enclosed) feels that this school is not entitled to dissection material. Will you please let us have your ruling on this matter?"

To the end that a complete understanding may be had relative to the right of the above college to have dissection material, we quote the letter directed by Dr. Terry to Dr. Schoemaker, which is appended to your request for an opinion.

> " * * * According to the present law it would appear that Dr. Carpenter's claim for dissecting material has support through the incorporation of his school and the teaching of anatomy. I would not be willing to accede to this interpretation for it certainly

was not the intention of the law to distribute bodies to institutions organized for gainful purposes. I think that it implied that the distribution of bodies should be done with the utmost descretion as to the responsibility to the public in the handling of them. This is safe-guarded at the present time by putting the material in care of the medical profession. If any undertaking concern can incorporate a school I think it is inevitable that the safe-guarding will break down to the peril of the continuance of the anatomical law. I think this interpretation should be presented to the Attorney General for an opinion before including an embalming school in the membership of the Anatomical Board. It would be far better for the Board as now constituted to receive and deliver for use bodies to the Embalming School which should be returned to some institution represented on the Anatomical Board."

We direct your attention to Section 9128, R. S. Mo., 1929, relating to the creation of the Anatomical Board, which provides in part as follows:

"Professors and demonstrators of anatomy of the schools and colleges of the state of Missouri, which are now or may hereafter become incorporated, and in whth said schools and colleges, descriptive and demonstrative anatomy is taught to students in attendance at said schools and colleges, shall be and are hereby constituted a board for the disposition and delivery of dead human bodies, hereinafter described, to and among such schools and colleges as under t e provisions of this article are entitled thereto."

In the case of State vs. Thatcher, 92 S. W. (2), l. c.

643, the court in discussing the language of an enactment said:

> " * * * the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied."

Section 9128, supra, unequivocally states that professors and demonstrators of anatomy of the schools and colleges of this state which are now, or may hereafter become incorporated, and in which said schools and colleges descriptive and demonstrative anatomy is taught, are constituted a board for the disposition and delivery of dead human bodies. As part of the curriculum of the schools and colleges in this state, it is necessary that descriptive and demonstrative anatomy be taught.

Gould's Medical Dictionary defines descriptive anatomy at p. 75 as being:

> "a study of the separate and individual portions of the body apart from their relationship to surrounding parts."

"Demonstrator" is also defined in Gould's Medical Dictionary as being:

> "one who instructs in the practical application of the arts and sciences."

Section 9130, R. S. Mo., 1929, relating to the distribution of dead bodies, provides as follows:

> "The secretary of the board shall cause to be distributed the bodies aforesaid to the schools and colleges mentioned

> in section 9128 hereof, upon the acceptance and compliance of said school and college with the provisions of this article in proportion to the number of students in attend nce at said schools and colleges, in which the subject of anatomy is being taught."

Section 9131, R. S. Mo., 1929, relating to when schools and colleges of this state, shall accept provisions of th s article, provides in part as follows:

> "The president and secretary of such school and college in this state, desiring to accept the provisions of this article, shall, within sixty days of the first day of each term of said school or college, make and furnish to the secretary of said board a sworn statement setting forth the number of students in attendance at said school or college in which the subject of anatomy is being taught; * * * * * "

You will particularly note that the schools and colleges of this state shall, within sixty days after the first day of each term of said school or college, make and furnish to the secretary of said board a sworn statement setting forth the number of students in attendance at said school or college in which the subject of anatomy is being taught. No doubt, the legislature at the time this section was enacted had in mind that the board should make disposition of dead human bodies based upon the number of students in attendance. It, therefore, becomes mandatory upon the president and secretary of such schools desiring dead human bodies, to make the sworn statement setting forth the number of students within sixty days after the first day of each term of said schools or colleges.

Section 9133, R. S. Mo., 1929, relating to the meeting of the persons who compose the Anatomical Board and the compensation of the secretary thereof, provides as follows:

> "The persons constituting the aforesaid

board shall meet on the first Tuesday in July, after the passage of this article, in Jefferson City, Missouri, and organize by electing a president and secretary and such other officers as in their judgment may be necessary, and shall thereafter meet as often as once in each year, and at such time and place as the board may decide. Said board shall fix the compensation of the secretary thereof, and each school or college accepting the provisions of this article shall pay to the secretary of said board a sum to be fixed and determined by said board; which shall be in proportion to the number of students in attendance at said schools and colleges, as set forth in the affidavit hereinbefore provided for, or so much per capita for each of said students; and the amount so fixed shall be paid to said secretary by each of the schools or colleges accepting the provisions thereof. (R. S. 1919, Sec. 7348.)"

CONCLUSION

In light of the above, it is the opinion of this department that any school or college now incorporated, or hereinafter incorporated, within this state, wherein the subject of descriptive and demonstrative anatomy is taught, is entitled to receive dead human bodies, provided they accept the provisions of Article 3 of Chapter 53, R. S. Mo., 1929 by making and furnishing to the secretary of the Anatomical Board a sworn statement within sixty days of the first day of each term of said school or college setting forth the number of students in attendance at said school or college.

We further rule that the schools or colleges accepting the provisions of the aforementioned article shall pay to the

secretary of the Anatomical Board a sum which is fixed and determined by said board based upon the number of students in attendance at said schools and colleges.

Respectfully submitted,

RUSSELL C. STONE
Assistent Attorney General

APPROVED:

C. C. Taylor
(Acting) Attorney General

RCS:RT

APPOINTMENTS: What constitutes a new appointment wit... ng
of Section 9636 R. S. Mo. 1929.

December 31, 1936.

1-4

FILED
68

Hon. Lee-Carl Overstreet,
University Attorney,
University of Missouri,
Columbia, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion under date of December 29th as follows:

> "The Board of Curators of the University of Missouri requests an opinion from you on the following matter.
>
> "From the standpoint of appointments, employees of the University of Missouri fall into two groups:
>
> "1. Those who are on so called Tenure, who are not re-appointed each year, but who serve, during good behavior, without further appointment or re-appointment;
>
> "2. Those who, by action of the Board of Curators, are appointed to serve, either for the calendar year or other twelve months periods, and who are re-appointed at the end of each such term of service.
>
> "The question presented by the Board of Curators for your determination is whether or not the re-appointment of an employee of the University of Missouri of the second group named above, to the same position held by him under his former appointment, upon the expiration of that appointment, constitutes a new appointment, under the meaning of Section 9636 Revised Statutes of Missouri, 1929?"

Section 9636 R. S. Mo. 1929, provides that:

> "No person who is related by blood or marriage to any member of the board of curators of the university shall be appointed to any position in the university as officer, member of any faculty or employe."

Ballentine's Law Dictionary defines the term "appointment" as "the selection of a person to some office or trust."

The second group as outlined in your letter are appointed by the Board of Curators to serve for a definite period and may at the end of such time be reappointed or displaced, subject to the pleasure of the Board .

Your request is limited only to the second group of employees, and it is only with this group that we confine our opinion.

Your question resolves itself to whether a person having served the period for which he was appointed, and now being subject to reappointment, has any special standing insofar as the prohibited relationship is concerned under Section 9636, supra.

In the case of Warrington v. Bobb, 56 S. W. (2d) (Mo. App.) 835, l. c. 837, the court said:

> "Of course our prime duty is to give effect to the legislative intent as expressed in the statute, and to that end there are many considerations to guide us. For instance, the object which the Legislature sought to attain by a statute, and the evil which it sought to remedy, may always be considered to ascertain its intent and purpose (Straughan v. Meyers, 268 Mo. 580, 187 S. W. 1159; Ross v. Ry. Co. 111 Mo. 18, 19 S. W. 541)."

We may, then, in ascertaining the meaning of Section 9636, supra, properly ask what was the evil which the Legislature sought to remedy?

The evil was clearly the appointment of individuals by the Board within the prohibited relationship. Is the evil removed by virtue of the fact that the employee has already served a term? In our opinion, the same evil exists for a person subject to reappointment stands in a natural position of preference or influence by virtue of the existing relationship.

It may be said, however, that the employee should not be penalized if, after proving satisfactory, he finds himself within the prohibited relationship.

The statute, however, makes no exceptions. It states in clear and unambiguous language that "no person" within the prohibited relationship shall be "appointed", and we are of the opinion that this prohibition remains whether same be termed a reappointment, new appointment or any other kind of appointment.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

WW.WR

GOVERNOR: Cannot offer r _ under Sec. 3589, R.S. Mo. 1929 unless some per n be charged with a felon or convicted of a felony and flee from justice.

3-18

March 18, 1936.

FILED
69

Honorable Guy B. Park,
Governor of Missouri,
Jefferson City, Missouri.

Dear Governor Park:

This department received from you on March 16 a request for the construction of Section 3589, R.S. Mo. 1929, your precise question being as follows:

> "Kindly advise me whether under Section 3589, R.S. of Missouri, 1929, or under any other authority, I am authorized to issue a reward under the circumstances as narrated in the letter, a copy of which I enclose."

Attached to your letter is a copy of a letter received from the Honorable William H. Sapp, Prosecuting Attorney of Boone County, wherein he makes the following request of you in connection with the recent death of Mrs. Eula Northcutt of Columbia, Mo.:

> "Mrs. Eula Northcutt was killed at her home here in Columbia on the 3rd day of July, 1935, and as yet we have been unable to solve the crime. I asked the County Court Saturday of last week to offer a reward for the arrest and conviction of the person or persons who committed the crime and it made such an order this morning. The Court fixed the amount of the reward at $400.00. If you will offer a similar reward, it is possible that something can be done."

Section 3589, R.S. Mo. 1929 provides:

> "If a person charged with or convicted of a felony shall break prison, escape or flee from justice, and abscond or secrete himself, the Governor of this state may, if he deem it expedient, offer any reward, not exceeding three hundred dollars, for the apprehension and delivery of such person to the custody of such sheriff or other officer, as he may direct."

This section is found under Article VIII, Chapter 29, the general caption being "Extradition and Arrest of Fugitives From Justice". While it might be conceded that every man who commits a crime and flees is a fugitive from justice, the statute appears to contemplate that either of two conditions must exist before the Governor may offer the reward not exceeding three hundred dollars, i.e., the person must be charged with a felony or must be convicted of a felony.

The letter from Mr. Sapp states that the crime has not been solved. He does not request you as Governor to offer a reward for any designated person--his letter purports to be a request for a reward for the arrest and conviction of the person or persons who committed the crime. Without any suggestion as to who may have committed the crime, and no one is mentioned as being charged with the crime, the County Court of Boone County, in offering the reward, does so under Sec. 3500, R.S. Mo. 1929, which is as follows:

> "Whenever the county court of any county in this state, or any two judges thereof in vacation, shall be satisfied that any felony has been committed in said county, such court or judges may, at their discretion, offer a standing reward of not exceeding five hundred dollars for the apprehension and arrest of the person or persons committing the same, which reward shall be paid out of the county treasury; but in no instance shall any reward, or any part thereof, be paid to any person who may

> be entitled thereto until final conviction of the defendant."

You will note from the above section that it is not essential for a person to be charged with or to have been convicted of a felony before the County Court is authorized to offer the reward not exceeding five hundred dollars, as the statute states "Whenever the county court * * * shall be satisfied that any felony has been committed in said county* * * "

The only decision in the State of Missouri that we are able to locate bearing on the question is that of State ex rel. v. Auditor, 61 Mo. 263, in which the facts were as follows (l.c. 265)

> "In 1866, in the month of February, the Governor of the State issued a proclamation reciting that four persons named were guilty of murder; that they had all fled from justice and were still at large, a reward of $300 was offered for the apprehension of any one of them, and a delivery to the sheriff, and a particular description of each fugitive was appended to the proclamation,"

and further enlightening on the fact that the reward must be offered for the apprehension of the person charged with a crime or convicted of a felony, the Court states (l.c. 269-270):

> "Conceding that this decision is applicable to the action of the Governor of Missouri in issuing a proclamation for a fugitive, the concession would only lead to the conclusion that the propriety of the Governor's action could not be questioned, and it may be further admitted that the proclamation was conclusive, that the persons advertised were indicted as stated, and that they were at its date fugitives from justice, although the Governor may upon these points have been misled by the information he received. But it does not follow from this that the arrest of the persons

> advertised as fugitives would authorize the payment of the reward offered, if it appeared that at the time of their arrest they were not in fact fugitives from justice, but living openly and notoriously at their usual places of abode, without any concealment, and accessible by the officers of the law at all times. The parties named in the proclamation may have been at its date fugitives from justice. At the date of the arrest, seven years after the proclamation issued, it is agreed they were not fugitives. The reward is offered to secure fugitives from justice, and not to secure the delivery of a person not a fugitive, and who can be arrested by the sheriff at any time he pleases."

Section 3589, supra, has remained on our statute books in its present terms for more than fifty years. We are unable to locate any other statute which has any bearing on the question.

We call your attention to the fact that Section 3589 leaves the matter entirely to your discretion by stating "The Governor * * * if he deem it expedient"; however, it is our opinion that even though you as Governor deem it expedient and desire to offer a reward, you cannot exceed the power given you by the plain wording of the statute. Crawford v. Spenney, 21 Ill. 288.

The Supreme Court of California, in discussing a section of the statutes similar in nature to that of the Missouri section, in the case of Lees v. Colgan, 52 Pac. l.c. 503, said:

> "The governor of the state offered this reward by virtue of the authority found in section 1547 of the Penal Code, and that section declares: 'The governor may offer a reward not exceeding one thousand dollars, payable out of the general fund, for the apprehension: (1) * * * (2) Of any person who has committed or is charged with the commission of an offense punishable with death.' It will be observed that the power of the governor is limited to offering rewards for the apprehension of certain criminals. * * * "

CONCLUSION

Section 3589, supra, authorizes you to offer a reward of not exceeding three hundred dollars for the apprehension of a person who is charged with or convicted of a felony, who breaks prison or who flees from justice, if you deem it expedient. In the instant case, as stated by Mr. Sapp, Mrs. Northcutt was killed at her home and the authorities have been unable to solve the crime; therefore, no one can be named as the probable murderer and as a result, no one is charged with the crime.

It is the opinion of this department the statute contemplates that the identity of the murderer must be known, and in issuing your proclamation it will be necessary for you to mention the name of the person charged with the crime. This, you cannot do under the information presented to you. We are therefore of the opinion that you cannot comply with the request of Mr. Sapp that you offer a reward similar to the reward offered by the County Court of Boone County.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SURVEYORS:)
) Removal from county no disqualification
COUNTY OFFICERS:) for office under Section 11571, R. S. 1929.

3-30

March 25, 1936.

FILED
69

Governor Guy B. Park
Executive Office
State of Missouri
Jefferson City, Missouri

Dear Governor Park:

This is to acknowledge receipt of your letter of March 19th, as follows:

> "A peculiar situation has arisen on which I desire your opinion.
>
> "A duly elected county surveyor has removed from the county from which he was elected. The County Court has declared the office vacant. Is there any law in Missouri which makes the office of county surveyor vacant upon his removal from the county in which he was elected to that office?"

We shall assume that the surveyor has removed from the county and changed his residence and also that he has not moved from the State of Missouri.

For the qualifications on eligibility of public officers in Missouri we must look to the Constitution and the statutory provisions therefor. Section 10, Article VIII of the Missouri Constitution, adopted February 26, 1924, is exactly the same as Section 12, Article VIII, Constitution of 1875, and provides as follows:

> "No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment."

And Section 11571, R. S. Mo. 1929, pertaining to "county surveyors" provides:

> "At the November election in the year 1868, and every four years thereafter, the qualified voters of each county shall elect some suitable person as county surveyor, who shall hold his office for four years, and until his successor is elected, commissioned and qualified. The present incumbents may remain in office until the persons elected at the time aforesaid are duly commissioned and qualified."

It will be noted that said Section 11571 provides that "the qualified voters of each county shall elect some suitable person as county surveyor." The statutory qualifications, therefore, are that the surveyor shall be a suitable person.

Funk & Wagnall's Standard Dictionary defines "suitable"; as fit or adapted for a specified purpose.

In an early case in Missouri - State ex rel. Attorney-General v. Woodson, 41 Mo. 227, l. c. 230, the court said:

> "The power of the state to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestioned as is the power to fix the qualifications of voters."

The state may fix the qualifications of those who shall hold state offices and, subject to such limitations

as may be imposed by the State Constitution, such power may be exercised by the State's Legislature. 46 Corpus Juris, p. 936. And at page 938, Section 35, of the same text, it is said:

> "In the absence of a constitutional or statutory provision residence within the district over which the jurisdiction of the officer extends is unnecessary to eligibility."

In Mechem on Public Officers, Section 438, page 280, it is said:

> "Where the law thus requires the officer to reside within the district which he represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result."

And conversely, where the law does not require one to reside in a district, a removal of an officer from the district does not create a vacancy in the office.

Section 11571, supra, has been carried forward in the different revisions of the statutes in almost identical form since 1855. It is a well known fact that at the time of the enactment of this statute (1855) that Missouri was sparsely settled and that many counties had not been organized. All lands at that time had not been surveyed and surveying was an important and a very necessary profession. A surveyor had to have special training and equipped to do technical work. At that early date there was much surveying and a surveyor's services were in great demand. It may have been then that there was no competent surveyor in many counties and residential qualification was not required; and the only statutory qualifications then, as now, were that he be a suitable person and the residents of the respective counties were permitted by statute to elect one who did not reside in said counties. This may

throw some light on the reason for the statute not requiring a residential qualification. Therefore, in the absence of any constitutional or statutory qualification that a surveyor reside in the county from which he was elected, we cannot say that a surveyor might not move from the county from which he was elected and thereby lose his office.

By an examination of the statutes of Missouri specific qualifications are required before one may hold certain offices and it is provided in some cases that officers must be residents of the township, county or district from which they were elected or appointed, and in other cases residence is not a prerequisite to the holding of the office.

It is also significant that under the County Highway Engineer Act, Article 8, Chapter 42, R. S. Mo. 1929, and particularly Section 8011 of said article and chapter, it is provided that the county court of some of the counties in this State may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he is thoroughly qualified and competent, as required by this article; and the requirement of the qualifications of a county highway engineer under Section 8009, R. S. Mo. 1929, is that he shall be a resident of the State of Missouri, and shall be skilled in the laying of drains etc. And in other counties the surveyor is ex officio county highway engineer. Section 8020, R. S. Mo. 1929.

It is, therefore, our opinion that if the surveyor in question has the constitutional and statutory qualifications to hold the office of surveyor, that the fact that he has removed from the county, and not outside the State, does not in itself create a vacancy in that office and constitute an abandonment of same, if said surveyor is ready, able and willing to perform all of the duties of said office.

Very truly yours,

APPROVED:

COVELL R. HEWITT
Assistant Attorney-General

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

CRH:EG

COUNTY SUPERINTENDENT OF SCHOOLS - Blanks and records to be supplied by whom; Budget of County Supt - how it can be spent.
TEACHERS' EXAMINATION FEES - For what fees are to be used.

April 20, 1936

4-52

FILED
69

Honorable Raymond H. Patterson
Superintendent of Schools
Galena, Missouri

Dear Sir:

Your request for an opinion dated April 11, 1936 reads as follows:

> "If at all possible I would like your ruling on the following: The county court says that they are only to pay my salary, postage, stationery, and mileage and that this comes from section 9461. They say that this section says that all necessary blanks shall be furnished from the State Supt. of Schools. Perhaps that is so as to blanks but not as to records for my office.
>
> "I am enclosing three records that I claim to be necessary to run my office. The county court says that they should not be paid for by the county court, but by the state or funds that I have from teachers' examinations, of which I am sure you cannot use for records for the office.
>
> "My budget was approved by the county court and by the state. I have a budget of $50.00 for printing. These records are the first that I have used of my budget and their cost is only $12.00. Of what value is a budget to a county officer, are they entitled to go ahead and carry out their budget according to their plan when it was made?
>
> "For what is the examination fee to be used for?"

Your request contains three questions, which may be stated as follows:

(1) Who shall supply office records for the use of the county superintendent of schools? Should the county court or the state superintendent of schools supply them, or should they be paid out of receipts from teachers' examinations?

(2) Who has the right to say how and for what the printing budget approved by the county court shall be spent, providing the expenditure is for something within the categorical class approved?

(3) For what is the fee obtained by the county superintendent from teachers' examinations to be used?

Section 9456, R. S. Mo. 1929 reads as follows:

" * said county court shall supply the superintendent with all necessary record books, stationery and postage stamps for properly conducting the business of his office, and shall allow all necessary printing of notices and circulars of information, the same to be paid for by warrant drawn upon the county treasurer."

The statute explicitly states that all necessary record books shall be supplied by the county court. It is a logical implication and reasonable deduction that the Legislature contemplated under the clause "shall supply record books for properly conducting the business of his office", that the term "record books" meant such a system of statistical records as would be necessary to carry on an efficient office. The term, therefore, encompasses and includes books, cards and other papers that go to make up the necessary records of the office.

The narrow and strictly literal interpretation of the statute is not to be taken, the courts of Missouri having shown a liberal attitude in a case involving similar statutes.

Section 9461, R. S. Mo.1929 provides for the furnishing of blanks to school officers:

> "All necessary blanks required by school officers shall be furnished by the state superintendent to the county superintendent, who shall immediately, upon the receipt of the same, supply the clerk of each district in their respective counties with the same, the form of such blanks to be determined and indicated by the state superintendent as provided by law; and all necessary expenses incurred by the superintendent for postage and stationery in supplying the districts of his county with blanks, laws, reports and circulars of information shall be paid for annually out of the county treasury, upon an order from the county court, based upon an itemized statement of the superintendent, accompanied by corresponding vouchers."

This section refers to school officers only. A "school officer" is "one whose office pertains solely to the management of schools". 33 Minn. 530. Missouri cases have held this to apply to district clerks, school directors, and county superintendents, among others. Any blank required for reports by any of the above are to be supplied by the state superintendent. Other reports, not of this nature, but necessary to properly conducting the county superintendent's office, must be paid for by the county.

It must be remembered, that it is wholly a matter of fact in determining under which statute the blanks used by the county superintendent of schools falls. If they are records for the use of the superintendent's office solely or

are from the teachers, the county pays for them. If they are records to be filled in by the school officers, then the state pays for them.

The County Budget Law, Laws Of Missouri, 1933, page 340, repealed only those laws in conflict with it and changed in no way those statutes under which the county court was made liable for expenses and salaries of county officials. The restraining feature of the Budget Law is that the officials cannot exceed their budget. As to the expenditure of the budget, the officer may spend the budget as he sees fit as long as it is a lawful expenditure, and if the county court refuses to approve it, he may force them.

In Ewing vs. Vernon County, 216 Mo. 681, it is said:

> "The county is bound to provide janitor service for the office of recorder of deeds and when the county court does not do so, the recorder may pay it himself and enforce reimbursement."

It must be noted that the county officer should be sure that the expenditure is lawful under the statute to avoid making himself personally liable.

Section 9475, R. S. Mo. 1929 provides for what the examination fee is to be used:

> "The fees so collected shall be used for the payment of the expenses of teachers associations and teachers' meetings authorized by this chapter - at least thirty per cent. being set apart and used for this purpose - and for the expenses incident to the grading of papers and issuing certificates of applicants for license to teach. The county superintendent of public schools shall remit to the state superintendent five cents for each subject written by each applicant, whose papers are sent to the state superintendent of schools."

CONCLUSION.

It is, therefore, the opinion of this department that the county must pay for all necessary office records for properly conducting the office of the county superintendent of schools. The state is to provide all blanks for a report from school officers. The county superintendent can spend the budget for anything that is lawful under those statutes, providing for what the county must pay as expenses.

The examination fees must be used for the payment of the expenses of teachers' associations and teachers' meetings authorized by statute - at least thirty per cent being set apart for this and used for this purpose. They are also used for expenses incident to grading of papers and issuing certificates. The county superintendent shall pay five cents for each subject sent to the state superintendent.

Respectfully submitted,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

AO'K:JET:FE

CORONERS)
DEAD BODIES): Coroners are required, whenever they have in their custody the body of a deceased person to be buried at public expense, to communicate with the secretary of the Anatomical Board for disposition of said body.

December 16, 1936

12-23

FILED
69

Dr. Louis R. Padberg
Coroner
1300 Clark Avenue
St. Louis, Missouri

Dear Dr. Padberg:

This will acknowledge receipt of your letter, requesting an opinion, which reads as follows:

> "Dr. D. M. Schoemaker, Secretary of the local Anatomical Board, came in to see me a few days ago in reference to the disposition of dead bodies which the Coroner's office of St. Louis heretofore has seen fit to send to Potters Field, which is a burial ground provided by the City of St. Louis for all unclaimed bodies.
>
> "Under the enclosed paper (Notification to Anatomical Board), Dr. Schoemaker claims that I should turn over to him all unclaimed bodies which I would ordinarily assign to Potters Field. * * * * *
>
> "The question naturally arises - how long does the body of such deceased which comes under the Coroner's attention belong to him? Does that ownership, if you will, of the body terminate at the close of the Inquest or at the burial? Or do those bodies remain the property of the Coroner in perpetuam?"

We direct your attention to Section 11626, R. S. Mo., 1929, relating to when it is the duty of the coroner to

bury the body of a dead human being, which reads in part as follows:

> "Whenever an inquest shall be held, if there be no relative or friend of the deceased, nor any person willing to bury the body, nor any person whose duty it is to attend to such burial, the coroner shall procure a cheap, plain coffin, and cause a grave to be dug and the body to be conveyed thereto and buried."

Your attention is further directed to Section 9129, of R. S. Mo., 1929, relating to the disposition of bodies of paupers, which reads in part as follows:

> "Superintendents or wardens of penitentiaries, houses of correction and bridewells, of hospitals, insane asylums and poor-houses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers in whose custody the body of any deceased person, required to be buried at public expense, shall be and are hereby required immediately to notify the secretary of the board of distribution, whenever any such body or bodies come to his or their possession, charge or control, and shall thereafter dispose of such body or bodies, as the secretary of the state board may direct: * * * * * ".

It is obvious that when one has read each of the above quoted parts of the statutes that there might be a conflict between the two and, in this respect, we must necessarily construe the statutes in light of the object to be attained by each of the respective statutes.

In the case of Coates and Hopkins Realty Co. vs. Kansas

City Terminal Railway Company, 43 S. W. (2nd), l. c. 822, the court said:

> "'All provisions of law on one topic should be considered in determining the meaning of any particular portion thereof * * * and such a construction should be given to the latter as will keep all the provisions of law on the same subject in harmony, and give effect to all, when possible.' * * * * * *. When statutes appear to be in conflict, it is the duty of the court to harmonize them, if possible, according to the general legislative intent."

Considering Section 11626, supra, we find that, in event an inquest be held by the coroner and there being no relatives or friends of the deceased, or any person willing to bury the body, it becomes the duty of the coroner to attend to such burial. Section 9129, supra, makes it the duty of the coroner whenever the body of any deceased person is to be buried at public expense, to immediately notify the secretary of the board of distribution, which secretary shall have the right to direct in what manner and how a body may be disposed of. Of perforce, someone must be charged with the duty of burying the bodies of deceased persons and the legislature has seen fit to place this duty upon the coroner. But, the fact that this duty was placed on the coroner does not in any wise relieve said coroner from the duty of notifying the secretary of the board of distribution for dead bodies.

There may be instances where the Anatomical Board has sufficient cadavers for their needs in the various institutions within this state. Should that occasion ever arise, the secretary of the Anatomical Board would, in all probability, advise the coroner. And, then the coroner should proceed to make disposition of such body or bodies in his possession in accordance with Section 11626.

#4 Dr. Padberg December 16, 1936

CONCLUSION

We, therefore, rule that coroners are charged with the duty of notifying the secretary of the Missouri Anatomical Board whenever they have in their custody the body of any deceased person required to be buried at public expense.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RCS:RT

TAXATIOn: Payment of costs of printing delinquent lists.

2-3

January 30, 1936.

FILED 70

Honorable Henry M. Phillips
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Mr. Phillips:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

> "Section 9952b, page 403, Mo. Session Acts 1935, which provides for publication notice of delinquent land to be sold, the costs of said publication etc., provides among other things: 'The expense of such printing shall be paid out of the county treasury* * * * *which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list.'
>
> What class of warrants should be issued to pay these publication costs?
>
> May these costs which are taxed and collected on the land sold be paid by the Treasurer (township organization county) directly to the Newspaper that published the notice, and said amount be deducted from the amount paid to the newspaper out of the county treasury for said publication?
>
> In case the budget allowance of the fund out of which these costs should be paid is exhausted before these costs for said publication has been incurred for the current year, could warrants for the payment of this cost of publication ever be legally issued thereafter?"

We shall answer your questions in the order inwhich they have been asked.

I.

EXPENSE OF PRINTING DELINQUENT LIST CHARGEABLE UNDER CLASS FIVE OF COUNTY BUDGET ACT.

As you have quoted the pertinent provision of the Jones-Munger Law relative to the expense of printing delinquent lists of lands and lots we shall not repeat that provision. Turning to the County Budget Law, page 340, Laws of Missouri 1933, we find the various classes which have been provided for in Section 5. The first class is the expense of keeping insane paupers in the State Hospitals. The second class is the expense of repair and upkeep of certain bridges. The third class is the expense of conducting Circuit Court and elections. The fourth class is county officials salaries and office expenses. It is certain that the expense of publishing the list of delinquent lands and lots cannot fall within any of the first four classifications. Class five is defined as

> "Contingent and emergency expense, not to exceed one-fifth of the total estimated revenue to be received. Purposes for which the court proposes the funds in this class shall be used shall be shown."

The expense of publishing the delinquent lists of lands and lots is in the nature of a contingent expense. It is contingent upon their being delinquent taxes and the costs of the publications cannot be foretold accurately in advance. At least it cannot be determined accurately at the time the budget is required to be made up.

CONCLUSION.

It is therefore the opinion of this office that the expense for publishing the delinquent lists of lands and lots is a proper charge under Class Five of the County Budget law.

II.

COST OF PRINTING DELINQUENT LISTS CHARGEABLE AS COSTS WHICH WHEN COLLECTED CANNOT BE PAID DIRECT TO NEWSPAPER.

Under point one of this opinion reference has been made to Senate Bill 57, page 402, Laws of Missouri 1935. It should be noted that this bill amended Section 9952b, page 430, Laws of Missouri 1933, by striking out the last sentence of that section and enacting in lieu thereof the following sentence:

> "The expense of such printing should be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed One Dollar for each description, which cost of printing at the rate paid by the county should be taxed as part of the cost of the sale of any lot contained in such list."

With reference to your particular inquiry, it is advisable for us to consider this law as it existed before the amendment adopted in 1935. By referring to the original section 9952b, page 430, Laws of Missouri 1933, we find that under the provisions of that law the newspaper publishing the notice "shall be paid by the purchaser or purchasers of the lands and/or lots sold". Therefore, under the law as existed before the 1935 amendment, the printer was required to rely for his pay upon the land being sold and his printing costs being collected from the purchaser as a part of the costs of the sale. No provision was made in that law for the payment of this expense by the county. In view of the provisions of the law as first enacted, this office held in an opinion rendered shortly after the Jones-Munger Act became effective, that the County Court was not permitted or authorized to pay out of the general revenue fund the expense of printing, but that the printer had to rely solely upon receiving his compensation if and when the costs were paid. Under this old procedure it was the duty of the County Treasurer and Ex-officio Collector, to collect these costs and to pay them to the parties to whom they were due, and thus the newspaper publisher would receive his portion of the costs at the time they were paid. However, it is clear that

the Legislature intended to change this system and to make the County responsible to the newspaper for this cost of publication. To now permit the Ex-officio collector to pay such costs directly to the newspaper would clearly violate the intention of the legislature. It was just such a procedure which the legislature determined to change by the adoption of the amendment in 1935. Judging the intent of the legislature by its acts, we must hold that the course suggested is contrary to such intent and therefore contrary to law.

As the legislature has established a mode of payment, that mode must be followed, another cannot be substituted for it. In this connection we direct your attention to the case of King vs. Riverland Levee District, 279 S. W. 196, in which the Court said:

> "* * * *our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 60 Mo.App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitious unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation, or to any different mode of securing the same. State ex rel. Evans vs. Gordon, supra."

While of course it is true that the newspaper publisher is not a public officer, yet the Legislature has specifically provided a manner or mode in which payment shall be received for making the publication required. Therefore it would be violative of the law for such compensation to be paid on any different basis or in any other mode or manner. The duty of the county treasurer is to deposit the costs received to the credit of the general revenue fund of the county and to permit him to pay such costs directly to the newspaper publisher would be violating the spirit and intent of the law.

CONCLUSION.

It is therefore the opinion of this office that the treasurer and ex-officio collector may not pay costs of publication collected on land advertised for sale and sold in November of 1935 directly to the newspaper publisher who published the notice, but that such costs should be paid into the general revenue fund of the county.

III.

WARRANTS FOR PAYMENT OF COSTS OF PUBLICATION CAN BE LEGALLY ISSUED ALTHOUGH ESTIMATED BUDGET ALLOWED IN CLASS FIVE IS EXHAUSTED.

In the event that the amount that your County Court alloted to Class Five under the budget act has already been exhausted such obligations may be paid under class six of the budget, provided there are funds available in class six for this purpose. If no such funds are available, valid obligations against Class Five may be carried over into the following year and paid out of revenues collected from delinquent taxes for the year in which the obligation is incurred. This office on January 11, 1935, rendered an opinion to the Honorable R. L. Jones, Clerk of the County Court of New Madrid, Missouri, wherein the following conclusion is reached:

> "Bearing in mind that it is the duty of the county clerk to list all unpaid obligations, as set forth in Section 4, supra, it is the opinion of this department that if no funds are available in Class 6 for the expenses referred to it will be necessary to carry the same over to the year 1935 and the obligations then be taken care of as the revenue from delinquent taxes comes into the hands of the county."

Although the facts in that opinion were not exactly identical to those disclosed in your request, to-wit, in that case there was a shortage of estimated funds in Class Four rather than in Class Five, yet the ruling therein made is applicable to the instant case, and as that opinion answers your question we shall not go into this further. We herewith enclose to you a copy of that opinion for your examination.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

HGW:MM
Enclosure.

COUNTY CLERK: Fee of 25¢ allowed to county clerk under Sec. 9955, Laws of Mo. 1933, p. 436, is an accountable fee.
COUNTY WARRANTS: Under Sec. 9911, R.S. Mo. 1929 warrants of current year may be accepted in payment of beer and liquor licenses.

37

March 6, 1936.

FILED
70

Hon. Henry M. Phillips,
Prosecuting Attorney,
Stoddard County,
Bloomfield, Missouri.

Dear Sir:

This department is in receipt of your letter of February 27 requesting an opinion on the following questions:

I

"Is the fee in section 9955, Laws of Missouri 1933, in regard to the clerk's services as Sale Clerk an accountable fee or an unaccountable fee?"

The county clerk serves as clerk of the sale of delinquent lands and receives a fee of 25¢ on each tract of land sold, as provided in Section 9955, Laws of Mo. 1933, p. 436, which provides:

"The clerk of the county court shall attend, either in person or by deputy, as the clerk of the sale of such delinquent land, and shall enter the same on a sufficient record book giving a description of the proper tract or lot, showing how much of each was sold, to whom, and the price, or whether the same remains unsold. For his services as in this section provided, he shall receive the sum of twenty-five cents on each tract of land or lot sold, to become part of the costs of sale and paid by the purchaser, which fee shall include entry of

> recital of redemption on such record."

In 1933 the Legislature repealed Section 11811, R.S. Mo. 1929 and enacted Section 11811, Laws of Mo. 1933, p. 370, the pertinent part of which is as follows:

> "The aggregate amount of fees that any clerk of the county court under Articles 2 and 3 of this chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. * * * "

The remainder of the section classifies the county clerks according to population and allows the clerks to retain a definite amount for themselves and deputies.

Section 11814, Laws of Mo. 1933, p. 372, relates to the report of excess fees and the payment of same, the pertinent part of which is as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of sections 11785, 11787, and 11788, or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by Section 11776. * * * *"

The above section mentions the fee sections applicable to the office of county clerk and we call your attention to the words "or of any other statute". By the terms of Section 11811, it was evidently the intention of the Legislature to limit the

amount of fees as compensation of the county clerk, and by the terms of Section 11814 it is evident that all fees which the county clerk may exact by virtue of his office, under any statute, is an accountable fee; therefore, we are of the opinion that the fee of 25¢ mentioned in Section 9955, Laws of Mo. 1933, p. 436 is an accountable fee.

II

"In regard to Section 9911, Revised Statutes 1929, can the county clerk accept county warrants of the current year on the payment of current licenses, such as county beer and liquor licenses, etc.?"

The constitutionality of the above section was challenged in the case of Kercheval v. Ross, 7 F. Supp. 355. In that case it was held that the state has constitutional power to pass statutes making state and county warrants, bonds and other obligations of its own subdivisions and instrumentalities legal tender for payment of future debts due the state or its subdivisions. The statute was held to be unconstitutional only in respect to permitting insolvent drainage districts to accept its past due bonds and coupons in payment of drainage taxes, thereby affecting the rights of holders of bonds issued before enactment of the statute because the same impaired the obligations of contract.

In view of the terms of Section 9911, R.S. Mo. 1929, to-wit,"****Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant * * *", we are of the opinion that a county warrant of the current year may be accepted by the county clerk in payment of a county beer or liquor license.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

SALES TAX: Receipts from operation of school bus not subject to tax; Funds derived from service charges to members of a mutual telephone company are subject to tax.

March 10, 1936.

FILED 70

Hon. James H. Pettijohn,
Prosecuting Attorney,
Holt County,
Oregon, Missouri.

Dear Sir:

This department is in receipt of your letter of March 4, requesting an opinion on two questions relating to the Sales Tax Act, which we shall discuss in the order presented.

I

"Is a party who is paid a salary by a school board for transporting children to and from school, required to make a return and pay a sales tax?"

The Emergency Revenue Act of 1935 (Laws of Mo. 1935, pp. 411 to 426, incl.) imposes a tax on two distinct types of sales--sales of tangible personal property and sales of certain services, substances and things. Funds derived from the transportation of children to and from school could not in any wise be considered sales of tangible personal property and if taxable at all, it would come under the provisions of Sec. 2, sub-section (h) (page 416), which provides:

"A tax equivalent to one (1) per cent. of the amount paid or charged for tickets, fares and services by every person operating a railroad, sleeping car, dining car, express car, and such buses and trucks as are licensed by the Public Service Commission of Missouri, engaged in the transportation of persons or freight for hire."

We assume that the party referred to in your inquiry uses a school bus; it is our understanding that school buses do not come within the jurisdiction of the Public Service Commission of Missouri. The test of the liability of busses for the tax under sub-section (h) of the Act is that said buses must be licensed by the Public Service Commission; therefore, it is the opinion of this department that a person operating a school bus is not liable for any tax within the meaning of the Sales Tax Act.

II

"Is a Mutual Telephone Company required to collect a sales tax on the service charge from members of the association, those payments being used solely to employ operators and maintain the lines belonging to the members?"

The service charges collected from individual members of a mutual telephone company do not constitute sales of tangible personal property; hence, must be determined by the terms of Sec. 2, sub-section (d) of the Act (Laws of Mo. 1935, p.415), which is as follows:

"A tax equivalent to one (1) per cent. on amounts paid or charged on all sales of service to telephone subscribers and to others through equipment of telephone subscribers for the transmission of messages and conversations, both local and long distance, and upon the sale, rental or leasing of all equipment or services pertaining or incidental thereto."

In view of the terms of the above section, i.e., "one per cent. ***on all sales of service to telephone subscribers and to others ***", it is the opinion of this department that service charges to members of a mutual telephone company are taxable within the meaning of the Sales Tax Act.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN,
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COUNTY COURTS: Contingent liability is not a debt within the meaning of the constitutional inhibition against county indebtedness. County Court may contract same regardless of constitutional provision.

March 17, 1936.

FILED
70

Hon. John B. Pew,
County Counselor,
624 Rialto Bldg.,
Kansas City, Missouri.

Dear Sir:

This acknowledges your letter which is as follows:

> "The County Court asked me this morning to request an opinion from you on the following proposition:
>
> "A request has been made that the State Works Progress Administration build 100 miles of gravity type sanitary sewer, consisting of mains, sub-mains, laterals, manholes and appurtenances in the Intercity District between Kansas City, Missouri, city limits and Independence, Missouri, city limits, within the valleys of Sugar Creek and Rock Creek and bounded within the limits of the territory originally known as Jackson County Sewer District No. 1.
>
> "The Federal Works Progress Administration request that the County Court of Jackson County, Missouri, sponsor this work and that the court agree to maintain it in this language:
>
> > 'and if such project is approved and constructed by the Works Progress Administration, it thereafter, at its own cost and expense, will maintain the project in a manner satisfactory to the Works Progress Admin-

> istration, or its authorized representatives, and will make ample provision each year for such maintenance.'
>
> "The County Court of this county is now greatly overburdened with what appears to be worthy things, which it has undertaken, but the combined expense of all is such that it is next to impossible for the County Court to meet its annual commitments out of its revenues. The court must proceed with great caution and when this thing was presented today, it was my opinion that the court had no authority, under the present law, to go into the business of maintaining sewers. We have no idea what the expense would be, and, as before stated, are already trying to do so much that it is very difficult to do it right with the funds at hand.
>
> "The Works Administration people are waiting for our action and we would like to have your opinion as early as possible."

Section 12 of Article X of the Missouri Constitution, in part, provides as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose."

In the case of Holloway to use v. Howell County, 240 Mo. 601, the court, in discussing the authority of a county to go in debt, uses the following language, l. c. 613:

> "The theory of our present system of county government is that counties must run their business affairs on the 'cash system'. * * * Running in debt is easy and pleasant while it lasts. Paying is 'another story'. The

> pleasure of debt-making is denied by law to Missouri counties; they can anticipate their revenue, but only for the current year."

In the case of Watson v. Kerr, 279 S. W. 692, speaking on the same subject, the court said, l. c. 695:

> "But, in construing the constitutional provision just quoted, we have repeatedly held that an indebtedness is not invalid merely because it appears at the end of the year in which it was created that the aggregate indebtedness incurred by the county during that year exceeded the revenue actually collected. If, at the time of its creation, the indebtedness is within the income which may reasonably be anticipated, it is valid."

In the case of Hawkins v. Cox, 334 Mo. 640, the court, in speaking of this same constitutional provision, said, l. c. 649:

> "The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year,' but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in Book v. Earl, 87 Mo. 246, where the court said: 'The contracting of a debt in the future by a county in any manner or for any purpose in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters' is prohibited."

In the case of Trask v. Livingston County, 210 Mo. 582, l. c. 594, speaking about whether the indebtedness was

created for the building of a bridge at the time of the letting of the contract, the court said:

> "Hence, the indebtedness for these bridges was created, if at all, by a compliance with the law governing the letting and contracting for bridges already noted. When the county became indebted on these bridge contracts must be determined by the 'income and revenue provided for such year,' which under the Constitution must be looked to for the payment of such indebtedness and it was the 'income and revenue provided' for the year 1889, which the county court was authorized to appropriate for that purpose, and not the revenue for the year 1890, which at the date of the contract for the building of said bridges had never been assessed, levied or collected."

At l. c. 695, speaking of the right of a city to obligate itself over a period of years for an annual payment to a water company, the court said:

> "And it was ruled that it was not the creation of an indebtedness for the aggregate of the installments to be paid under the contract, this court saying: 'A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to the defendant, and if not furnished no payment could be required of it.' In Lamar Water & E.L. Co. v. Lamar, 128 Mo. l. c. 222, this court quoted with approval from Judge Dillon in his work on Municipal Corporations, as follows:

> 'Under the constitutional provisions in Iowa, Illinois, Indiana and Pennsylvania, referred to, it is held that a corporation may make a contract (at least, for necessaries) covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished, and in such case, the whole amount which may ultimately become due does not constitute a debt within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition.'"

The Supreme Court in construing the above constitutional provision has, we think, clearly held that a county cannot in a given year create a debt against the county revenues in excess of the revenues on hand and the reasonably anticipated revenues for that year, and in the case of Barnard & Company v. Knox County, 105 Mo. 382, in holding a contract which went beyond this limit void, the court said, l. c. 390:

> "It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such surface view of the matter. The Constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves, to take notice of the limit prescribed by the Constitution. * * * Soliciting agents, contractors and others who deal with county officials must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. Unless

> this is so, there is an end to all effort to bring about an economical and honest administration of county affairs."

However, those cases are not in point with reference to the question you raise. The constitutional prohibition against the counties is that they shall not "become indebted". A debt is variously defined, but not all obligations are debts within the meaning of the law. To become indebted means the same as to contract a debt.

17 C. J., page 1377, speaking of contingent liabilities, says:

> "Every debt must be either solvendum in praesenti, or solvendum in futuro--must be certainly, and in all events, payable; whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a 'debt'. While the sum of money may be payable upon a contingency, yet in such case it becomes a debt only when the contingency has happened, the term 'debt' being opposed to 'liability,' when used in the sense of an inchoate or contingent debt."

In the case of Appeal of City of Erie, 91 Pa. 398, 402, the term "debt" is defined as meaning

> "a fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future."

In the case of Saleno v. City of Neosho, 30 S. W. 190, 192, 127 Mo. 627, 27 L. R.A. 769, 48 Am. St. Rep. 655, the court holds that a debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, dependent upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed.

In 37 L. R. A. (N.S.) pages 1063, 1064, 1065 and 1066, is a discussion of when obligations payable in installments become due for the purpose of defining the amount of the debt. At page 1066 it is stated:

> "The weight of authority favors the view that obligations for public service under contracts calling for payment in installments as it is rendered do not create an indebtedness against the municipality until the service is performed, at which time the installments become due."

It will be observed that the quoted part of the agreement between the County Court of Jackson County and the Federal Works Progress Administration is that, provided such project is approved and constructed, the county will

> "thereafter, at its own cost and expense, maintain the project in a manner satisfactory to the Works Progress Administration, or its authorized representatives, and will make ample provision each year for such maintenance."

That provision does not specify that the County Court will expend any money, and for all that is now known the County Court may never be required to spend any money on this project in order to "maintain the project in a manner satisfactory to the Works Progress Administration", and if that be true, then the "ample provision each year for such maintenance" would not require the expenditure of any money by the County Court. This agreement, as set out in your letter, can at most be but a contingent liability and is not a debt within the meaning of that term as used in the Constitution hereabove referred to.

Your inquiry does not state that the County Court is incurring any expense or issuing any warrants, and we assume the fact to be that your County Court is not for the present year assuming any contractual obligation which is greater than the reasonably anticipated revenues of the county for the current year, and that this project will be constructed by the Works Progress Administration.

This opinion is limited to a discussion of whether entering into this proposed contract violates the law pertaining to the authority of the County Court to contract debts beyond the reasonably anticipated revenues of the

county for the current year, and we do not pass on the advisability of the proposed project, as this is a matter for the County Court to determine.

Since writing the above we have read the case of State ex rel. City of Hannibal v. Smith, 74 S. W. (2d) 732, which is further authority for the views herein expressed.

CONCLUSION

It is our opinion that, under the above state of facts, the law authorizes the County Court of Jackson County to enter into the agreement embodying the clause set forth in your letter and here inquired about.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

TAXATION: Owner of undivided interest may redeem entire tract from sale.

12-21

December 17, 1936.

FILED
70

Hon. W. S. Pelts
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Mr. Pelts:

We are in receipt of your request for an opinion of this office reading as follows:

> "I am writing you in regard to some land that was sold by the collector for taxes in 1936.
>
> The purchaser at this sale is J. T. Drisdell and the collector issued him a certificate of purchase at the time. Now Mr. McCammon of St.Louis is wanting to redeem this land and states to collector in his letter he owns five thirtieth or one sixth and perhaps some other interest.
>
> What I want to know is can Mr. McCammon redeem any greater part of this land than he actually owns. The fact that he owns one sixth would that warrant the collector permitting him to redeem the whole tract, or should he limit him to the one sixth he owns according to Section 9955a, Session Acts 1933?
>
> It seems that Section 9956a, Session Acts 1933 is a little confusing and that is the reason I want your opinion on this question."

In determining the issue presented by your communication we are resolved to the provisions of the specific statute under consideration and the application of general and well known principles to such statutory enactment. It is to be remembered that the Jones-Munger Law, beginning at page 425 Laws of Missouri 1933, set up a new and complete system for the enforcement of the payment of delinquent real estate taxes. Along with the provisions looking to the enforcement of the payment of the taxes, specific sections were enacted referring to the redemption of the property from the sale, thus looking to a protection of the property rights of persons who, through temporary financial embarrassment, might otherwise be required to finally sacrifice their land in payment of the obligation due the state. Sections 9955a to 9956a inclusive, set up means whereby redemptions may be made from the sales provided for in this law. You refer to section 9955a, page 436, Laws of Missouri 1933 in your communication. This section is short and reads as follows:

> "Any person claiming an undivided part of any land sold for taxes may redeem the same on paying such proportion of the purchase-money, interest, penalty and subsequent taxes as he shall claim of the land sold."

Section 9956 commences:

> "In every case where a partial redemption is asked for*******"

and then provides the specific procedure through which the person shall go through in order to effect a partial redemption. In other words it appears that Sections 9955a, 9955b, 9955b and 9955d each provide a specific right to a person who only desires to redeem that certain part of the tract in which they are particularly and especially interested by virtue of their ownership of the undivided share or specific part of land which may have been sold for taxes. Section 9956 prescribes the manner in which such partial redemptions may be effected. However, Section 9956a provides in part as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner:***"

Thus this section authorizes and provides that any person having an interest in the land may, if he so desires, redeem the tract or lot of land sold. Thus it appears that this later section provides a right in any person owning a tract to redeem the tract from the sale or if such person has an interest in the tract, they may redeem the entire tract from the sale. We must give a specific meaning to the words "or any persons having an interest therein" which are contained in Section 9956a, because of well known rules of construction. After thus analyzing these pertinent sections of the law it appears that we should apply the rules well known and recognized as applicable to this legislation. These sections are of course sections authorizing redemption from tax sales. Such laws are recognized as remedial laws. 25 R.C.L. 1080, Section 300. Remedial statutes should be interpreted liberally to embrace all cases fairly within their scope and so as to accomplish the object of the legislature and effectuate the purpose of the statute. 59 C.J. 1107, Section 657.

In 26 R.C.L. 427, Section 384, we find the following statement:

> "In most of the states the right of redemption is based wholly on statute and exists only so far as specifically provided; but it has always been held that a redemption law ought to receive a liberal construction in favor of those whose estates will be otherwise divested, especially where the time allowed is short, and ample indemnity is given to the purchaser and a penalty imposed on the owner."

Applying a liberal construction to the statutes in question, it appears that the Jones-Munger law authorizes a person having an undivided interest in a tract or lot of land to redeem his undivided interest if he so desires, or, if he so desires, he may redeem the whole tract from the sale.

CONCLUSION.

It is therefore the opinion of this office, from the information contained in your communication, that in the question put, Mr. McCammon is entitled to redeem the whole tract from the sale if he deposited with the County Collector a sum sufficient to cover the entire tax, penalty, interest and costs which have accrued.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HGW:MM

Approval of Articles of Association of the Group Hospital Service, Inc.

April 7, 1936.

47

FILED
71

T. Hartley Pollock, Jr., Esquire
c/o Messrs Thompson, Mitchell,
Thompson & Young
Lawyers
705 Olive Street
St. Louis, Missouri

Dear Sir:

This is to acknowledge your letter dated April 3, 1936, wherein you enclosed copy of proposed Articles of Association of the Group Hospital Service, Inc., and you desire our opinion of approval of said articles.

If the court enters a Pro Forma Decree of Incorporation along the same plan as stated in the Articles of Association of Group Hospital Service , Inc., of St. Louis, Missouri, attached to your letter, in our opinion it would be a legal incorporation under Article 10, Chapter 32, Revised Statutes of Missouri, 1929.

It is our further opinion that said proposed plan, if incorporated by pro forma decree, would not be a cooperative company within the purview and meaning of Article 9, Chapter 32, Revised Statutes of Missouri, 1929.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

COUNTY COURT: County Court may purchase certificates of purchase on delinquent tax lands if it desires to take that means of purchasing property for the use and benefit of the county.

(For case right on this question see City of Jefferson v. Curry 71 Mo. 85)

August 19, 1936.

9-3

FILED
71

Mr. F. Edwin Pollard
Collector of Revenue
Audrain County
Mexico, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

> "The Audrain County Court is interested in buying some properties to be sold by the County Collector in our November tax sale.
>
> "Will you please give us your opinion on the Court buying property and the procedure in purchasing at the tax sale."

The General Assembly, regular session, in 1933 passed an Act known as Senate Bill No. 94, which is found in Laws of Missouri, 1933, pages 425 to 449, inclusive. Many changes were made in the tax laws of our State relating to the foreclosing of the State's lien for delinquent taxes. Previous to the enactment of Senate Bill 94, the suit was brought in the circuit court to foreclose the State's lien and the property sold by order of the court. Under Senate Bill 94 the county collector sells the property.

In State ex rel. Karbe et al. v. Bader, 78 S. W. (2d) 835, the Supreme Court of Missouri, en banc, said (p. 837):

> "The method of foreclosing the state's lien for delinquent taxes, which for many years had been by suit in a court of competent jurisdiction in the county wherein the lands were situated, was

> radically changed by Senate Bill No. 94. It expressly repealed numerous sections of the former statute and particularly Section 9952, authorizing such suits, and substituted a scheme for foreclosure by sale by the collector at the courthouse door on the first Monday in each year, upon published notice thereof, and without resort to judicial proceedings -- the general statutory plan prevailing prior to the year 1877."

Section 9952c, Laws of Missouri, 1933, page 431, provides in part as follows:

> "On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest charges thereon, or chargeable to such person in said county. The person offering at said sale to pay said sum for the least quantity of any tract shall be considered the purchaser of such quantity."

Section 9953c, Laws of Missouri, 1933, page 433, provides in part as follows:

> "Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, * * * * * * * * * * * *."

Section 9953d, Laws of Missouri, 1933, page 433, provides in part as follows:

> "After payment shall have been made the county collector shall give the purchaser

> a certificate in writing, to be designated as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, * * * * * * ."

You will note that said sections make it the plain duty of the county collector to sell lands upon which taxes are unpaid and delinquent, and the purchaser at said sale must immediately deliver the amount of money bid to the collector. After the collector receives the money he issues a certificate of purchase. Nowhere do we find in Senate Bill 94 that the county court is precluded from purchasing property for the use and benefit of the county at a tax sale. Neither do we find any provision that makes the county collector the agent of the county court in performance of his duties relating to the sale of land for unpaid and delinquent taxes.

Section 2078, R. S. Mo. 1929, relates to the county court and gives them power to purchase real or personal property for the use and benefit of the county. Said section provides in part as follows:

> "The county court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase * * * * * * any property, real or personal, for the use and benefit of the county."

We do not find any statute that provides that the county court may not purchase at a tax sale, the only limitation being that if property is purchased it must be for the use and benefit of the county. It might be argued that it would be against public policy to permit the county to purchase at a tax sale in view of the fact that by such purchase the land would thereafter be exempt from taxation.

Section 9954b, Laws of Missouri, 1933, page 435, provides that the purchaser shall pay subsequent taxes. However, we do not believe that said section could be construed to deny the right of the county to purchase at a tax sale solely because that section could not be complied with. Said section provides:

> "Any purchaser at delinquent tax sale of any tract or lot of land * * * * who takes possession of any tract or lot of land within the redemption period shall be required to pay the taxes subsequently assessed on such tract or lot of land during the period of occupancy * * * *."

Thus, while the above section contemplates the paying of taxes, yet, if no taxes would be assessed, none would be due and owing. Please do not understand us to mean that if the owner of the tract of land reclaims it, as such has the right to do, that he would be relieved from paying taxes on said tract solely because the county court was the purchaser of the tax certificate. Said question is not before us,and we do not by this opinion in anywise hold that the county court having bid in the land relieves the owner of subsequent taxes if such is redeemed by him. The serious question, as we view it, is -- Whether or not the county court by purchasing at a sale by the collector is against public policy.

The Supreme Court of Missouri in Walcott v. Hand, 122 Mo. 621, held that the collector who purchased land sold for taxes under a judgment of the circuit court and execution issued thereon to the sheriff, was not void as being against public policy. The court, page 628, stated:

> "Counsel correctly assumes that a public officer charged with the duty of selling property for the best price cannot himself become the purchaser, and that a sale made by an agent or trustee to himself will not be sustained by the courts. These statutory and fundamental principles are not controverted by counsel for defendant, but he insists that both reason and the authorities distinguish between a sale by a tax collector to himself, and a sale to him by a sheriff made under a judgment and execution of the circuit court; that, after the execution came to the hands of the sheriff, the sheriff, and not the collector, was charged with its execution and responsibility attending the sale.
>
> * * * * * *

(p. 629)
"The sheriff, and not the collector, is charged by law with the execution of the process. He advertises and conducts the sale, and the collector has no control of the process, other than to stop the sale, if the owner shall pay the taxes and costs.

* * * * *

(p. 630)
"The collector of taxes cannot stand in a closer trust relation than an administrator, and if the law does not forbid the purchase by an administrator when a sheriff sells under judgment and execution, no good reason can be given why it should forbid the collector the same privilege, in the absence of fraud, conspiracy or collusion.

"Our conclusion is that the mere fact that the collector bought the land at the sheriff's sale will not render his deed void, and the court committed no error in so holding."

The above case was affirmed and followed in Turner v. Gregory, 151 Mo. 100, wherein the court said (p. 106):

"As to the other contention that the sheriff's deed to Oscar Reeder was void because Reeder was the collector who brought the suit, we have ruled otherwise in Walcott v. Hand, 122 Mo. 621, to which we still adhere."

In Walker v. Mills, 210 Mo. 684, the court held that an attorney for a county collector had a right to purchase land at a sheriff's sale if no fraud or collusion was raised by the pleadings. The court said,at page 689, the following:

"It appeared from the evidence that the plaintiff was attorney for the collector

> at the time the tax proceeding was begun, but was not really tax attorney for the collector in office at the time of the sale. He had however looked after all the cases brought by him while acting for the collector who appointed him and this case with the others. Defendant contends that the attorney for the collector has no right to purchase at a tax sale. There are many respectable and forceful cases holding that a public officer whose dutyit is to collect taxes cannot purchase at such sale. Such, however, is not the rule in Missouri. (Walcott v. Hand, 122 Mo. 621; Turner v. Gregory, 151 Mo. l. c. 106.)"

From the above and foregoing it is our opinion that the county court would have the power and authority to purchase tax certificates on land offered for sale by the collector in order to satisfy the State lien on unpaid and delinquent taxes if the county court desires to use such means of acquiring property for use and benefit of the county. It is our further opinion that such purchase by the county would be valid just so long as there was an absence of fraud, conspiracy or collusion.

In answer to your question as to the procedure the county would pursue in making the purchase, we are of the conclusion that the same procedure would prevail as in the case of the purchase of land. The county court is a court of record (Section 1826, R. S. Mo. 1929) and, of course, speaks through its record. We believe that the county court, if it desires to use the means of acquiring property by purchasing certificates at the collector's sale, should by record so state the fact and then appoint an agent in order to carry out its wishes. Of course, the county court would have to have available money with which to purchase said certificates and would have to follow the provisions of the County Budget Act (Laws of Missouri, 1933, page 340, Section 2) in obtaining from proper

class the amount of money necessary, which would be either Class 5 or Class 6.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

CRIMINAL LAW: A judgment and sentence cannot be modified or changed after a term of court has adjourned - only recourse for boy under 17 years of age receiving sentence to penitentiary or Algoa Farms is pardon, parole, reprieve or commutation by the Governor or by writ of habeas corpus.

October 2, 1936.

10-71

FILED
71

Honorable J.T. Pinnell,
Prosecuting Attorney,
Pineville, Missouri.

Dear Sir:

This department is in receipt of your letter of September 24 relating to one Melvin Parks, a juvenile. Your letter is as follows:

> "At the August term of the McDonald County Circuit Court, Melvin Parks, upon his plea of guilty to an information charging a felony, viz: Forgery, he was sentenced to serve two years in Algoa.
>
> "The Sheriff took him to the warden, who claimed he could not accept him for the reason that Parks told him he was only 15 years old. The Sheriff returned Parks to our county jail, where he is at this time.
>
> "When arrested, Parks told me he was 20 years of age. At the trial, he told the Circuit Judge he was 17 years of age. He told the Warden he was 15 years of age. The sheriff here has a letter from the sheriff at Anadarko, Oklahoma, where Parks' mother lives stating that Parks' actual age is 15.
>
> "As I understand it, our Circuit Judge lost jurisdiction of this matter at the adjournment of the Circuit Court after he sentenced Parks to Algoa. In my opinion, the matter now should be properly brought to the attention of the Governor."

It appears that Parks' age has finally been definitely determined to be fifteen years. Under Section 8350, Laws of Missouri 1933, p. 331, Parks should have been sentenced to the Missouri Training School for Boys, but as he deceived you and the officers as to his correct age, stating he was twenty years of age, he was sentenced to the Intermediate Reformatory at Algoa under the same section which provides for the commitment of boys between the ages of seventeen and twenty-five years to that institution. The term of court having finally adjourned, we are of the opinion that the Judge of the Circuit Court cannot change or alter the sentence.

In the case of Ex parte Thornberry, 300 Mo. 661, the Court said:

> "Jurisdiction of a court is exhausted by entry of final judgment and cannot be removed for any purpose which will modify or change the original sentence."

This is likewise the decision in the case of Ex parte Cornwall, 223 Mo. 259 and State v. Nistendirk, 204 S.W. 1111, or to like effect.

Under Section 8351, Laws of Mo. 1933, p. 332, the Governor has power to commute the punishment of any boy under twenty-five years of age who may have been sentenced to the penitentiary when he may deem it suitable to sentence the boy to the Intermediate Reformatory, but there is no provision for the Governor commuting the sentence of a boy to the Missouri Training School For Boys at Boonville. Therefore, as suggested in your letter, it becomes necessary to consult the general powers of the Governor with reference to commutations, pardons and paroles.

In 1933, the Legislature amended Section 8518, R.S. Mo. 1929, and it now reads as follows (Laws of Mo. 1933, p. 329) R35-108

> "That hereafter all applications for reprieves, commutations, paroles and pardons shall be made by petition in writing to the governor, signed by the party under conviction, or other person in his behalf, which petition shall contain a brief history of the case and the reasons why such pardon should be granted; and

shall also be accompanied by a statement of facts in writing, made by the prosecuting attorney of the court in which the conviction was had, or satisfactory reasons shall be given to the governor why such statement of the prosecuting attorney does not accompany such petition; and it shall be the duty of the prosecuting attorney to give such statement when requested so to do. The governor is hereby authorized to grant commutations, paroles and pardons upon such terms and conditions as he may see fit to impose."

CONCLUSION

We are of the opinion that the only recourse now open, if it is desired to reprieve, commute or parole the boy is to follow the terms of the statute. It is the duty of the Attorney General and the various prosecuting attorneys of the state to uphold sentences imposed by courts or juries, but under the facts as you present them and the view that you personally have in regard to the matter, we would suggest, by way of last resort, a proceeding in the nature of a habeas corpus.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CITIES: HIGHWAYS: Special road and bridge funds may be spent by county within cities under certain conditions, but cities not entitled to require it.

October 23, 1936.

10-23

FILED 71

Hon. J. E. Poole,
Clerk, Scotland County Court,
Memphis, Missouri.

Dear Mr. Poole:

We acknowledge receipt of your inquiry which is as follows:

> "I would like very much to have an opinion on the following matters pertaining to our county.
>
> "We have one road district which embraces the entire county and known as Scotland County Road District. We have no Special Road Districts in the county but the towns of Memphis, Gorin, Rutledge, Granger, and Arbela have roads lying within the city limits of each town which the county does not maintain.
>
> "The city of Memphis levy a city tax for city purposes alone which includes a twenty cent levy for road purposes. Each town also levies and collects a Poll Tax.
>
> "The county levied eighteen cents on each hundred dollar valuation under Section 7891 this year.
>
> "Are the above mentioned towns entitled to the part of the special tax which arose and was collected in each city or town and does the county have to turn such collections to each city or town? If so, does each city or town have to present a statement of materials furnished and work performed which must be passed upon by the county court in order to draw their money?"

We understand your question to be, is a city entitled to have the county court turn over to the city a part of the special road and bridge tax levied?

Section 7891, R. S. Mo. 1929, provides the authority for the county court in levying a special road and bridge tax. It will be observed that the latter portion of said section provides that the part of the money arising from the collection of taxes for special road and bridge purposes on property not located in any road district is to be placed to the credit of the "county road and bridge fund", and to be used in the construction and maintenance of roads, "and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

It will be further observed that this last quoted part of said section places the discretion in the county court of so using said funds. In other words, if they see fit to use a part of said funds in improving or repairing a street in an incorporated city, etc., and such is within the county and forms a part of a continuous highway of said county leading through such place, they may do so, but are not required to do so.

In the case of Billings Special Road District v. Christian County, 5 S. W. (2d) 378, 319 Mo. 963, l. c. 975, after discussing the case of Hannibal v. Marion County, 69 Mo. 571, and other cases there cited, states:

> "Here the question is as to the power of the legislature to direct a disbursement of taxes collected, and an examination of the two cases referred to in the 15th and 34th volumes of our reports seems to render any additional investigation into this question superfluous. It was held in both these cases that the legislature had full power to direct what should be done with the taxes levied and collected from any county."

With respect to the right of special road districts to receive their portion of the money collected from such a tax on property within the district, the legislature has definitely spoken, saying that they shall be entitled to the same. Cases so holding are State ex rel. Special Road District v. Holman, 305 Mo. 195, State ex rel. Special Road District v. Barry County, 302 Mo. 279, and Billings Special Road District v. Christian County, supra, basing their conclusion on the fact that the legislature had definitely so stated with respect to such special road districts.

But if the tax money so collected by the county is not collected from property within the road district to which the legislature refers when it directs the expenditure of money arising from the taxes collected within such road districts, the legislature has only expressed itself in restricting the powers of the county court in the expenditure of such funds by the language used in the latter part of Section 7891, supra. By that language they place the discretion in the county court of spending this money within the towns therein designated, provided it is spent in repair or improvement of streets within such towns, and provided further that the towns are located in the county and that such streets are a part of the continuous road system of the county, and by implication, it would seem, limited the counties to this method of expending said funds within the city, which would lead to the conclusion that the county would not be authorized to expend said funds on streets within such cities which did not come within the above classification.

The statement contained in the first part of your inquiry that you have one road district which embraces the entire county and is known as Scotland County Road District is rather a novel situation, but your inquiry does not raise the question as to whether this special road district or this road district comprising the whole county is entitled to have these funds set over to it.

We find no provision in the law authorizing cities to require the county court, acting for the county, to pay over to a city any part of the special road and bridge funds.

CONCLUSION

It is our opinion that the towns set forth in your inquiry are not entitled as a matter of right to have turned over to them by the county court any part of the special road and bridge taxes, and that it is discretionary with the county court as to whether they spend within said towns or cities any part of the funds of the special road and bridge tax levy, and that if they exercise their discretion to spend a part of said special road and bridge funds within the city, they should be spent only on streets within the city that are a continuation and part of the county road system, and the city or town in which they are expended must be located within the county.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

COUNTY COURTS: Not authorized to levy more than 40¢ for county purposes, as provided by the Constitution, absent a vote of the people.

November 30, 1936.

12-✓

FILED
71

Honorable J.T. Pinnell,
Prosecuting Attorney,
McDonald County,
Pineville, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry, which is as follows:

> "The assessed valuation of McDonald County is between six million and ten million dollars. The County's warrant indebtedness is being reduced to judgments. The total will be probably $50,000.00.
>
> "Sec. 2892, R.S. 1929, provides 'that nothing in sections 2892 to 2894 inclusive, shall be so construed as prohibiting any county * * * that has or may hereafter have a bonded or judgment debt * * * from funding or refunding such debt without the submission of the question to a popular vote * * * '
>
> "Under the Constitution, this county can not exceed a 40 cent levy for 'county purposes.'
>
> "Question: Could the County Court levy a bond tax (in excess of the levy of 40 cents for county purposes) for the payment of bonds and interest?"

Section 11, Article X of the Missouri Constitution, providing for the levy of taxes for county and other purposes, provides in part as follows:

> "For county purposes, the annual rate on property * * * in counties having six million dollars and under ten million dollars, said rate shall not exceed 40 cents on the one hundred dollars valuation * * * said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness * * * "

Section 12 of Article X of the Missouri Constitution, in part, provides:

> "No county * * * shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose. Nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein * * * "

Section 2892 (Laws of Mo. 1931, p. 138) provides that the various counties are authorized by their respective county courts to

> "fund or refund any part of all of their bonded or judgment indebtedness, including bonds, coupons or any judgment, whether based on bonded or other indebtedness, and for that purpose may make, issue, negotiate, sell and deliver renewal, funding or refunding bonds, and with the proceeds thereof pay off, redeem and cancel such judgments or old bonds and coupons as the same mature or are called for redemption, or such renewal, funding or refunding bonds may be

> issued and delivered in exchange for the judgments, bonds or coupons to fund or refund which the renewal, funding or refunding bonds were issued: Provided, that in no case shall the amount of the debt of any such county, township or parts of townships, or city, village, incorporated town, school district or road district be increased or enlarged under the provisions of this chapter, and provided also that no renewal, funding or refunding bonds issued under this chapter shall be payable in more than twenty years from the date thereof,
>
> * * *
>
> Provided further, that nothing in sections 2892 to 2894, inclusive, shall be so construed as prohibiting any county, city, township, school district or road district from renewing, funding or refunding such debt without the submission of the question to a popular vote)"

Section 2893, R.S. Mo. 1929 provides the method for holding the election. Section 2894 empowers the county court to proceed to fund any part or all of such indebtedness in conformity with the provisions of said Chapter 15, R.S. Mo. 1929. Section 2895 provides that the county shall, at the time of issuing the bonds, "provide in the express manner provided by law for the levy and collection of an annual tax sufficient to pay the annual interest on such funding bonds as it falls due, and a sufficient sinking fund for the payment of the principal of such bonds when they become due."

We construe your question to be that, assuming your county has a bonded or judgment indebtedness which is valid but which cannot be retired with the collection of the 40 cent levy authorized by the Constitution, is your county court authorized without a vote of the people to levy a tax in addition to the 40 cents for county purposes, from which additional tax the said debts may be retired?

In the case of Lamar Water & Electric Light Company v. City of Lamar, 128 Mo. 188, 194, speaking of whether the same rule applies to counties as applies to cities with reference to the construction of these constitutional provisions, the Court (l.c. 194) said this:

> "This line of reasoning is far reaching in its consequences, for if correct as to cities, it is correct as to counties, school districts and townships."

This was a case by the Court En Banc in which the Columbia Case (1892) 111 Mo. 365, 20 S.W. 236, and later before the Court En Banc in State ex rel. v. Seibert (1893) 116 Mo. 415, 22 S.W. 732, was overruled, and the Court here speaking of Sections 11 and 12 of the Missouri Constitution said (l.c. 215):

> "Section 12 could then be regarded as a proviso to section 11, and any tax duly levied to meet a voted indebtedness would have a solid foundation on the taxable resources of the locality. Yet on the other side, the possibility of depriving the municipality of means to sustain its government would disappear.
>
> "By that construction alone, it seems to us, can both of these sections be given full force."

And at page 216, it is said:

> "The two sections are component parts of a system of financing which experience pointed out as furnishing a safer course than had been previously followed.
>
> "Two great objects were in view and each of the sections treats of one of them.
>
> "One object was to limit the rates of taxation for raising the annual revenue required for local purposes; the other to limit the power to incur indebtedness beyond the annual income and revenue provided for any one year."

And at page 220, the Court said:

> "It seems first of all necessary that the funds, permitted by section 11 to be raised, for the legitimate, ordinary purposes of the government, should be preserved from invasion or diminution by any tax levied under section 12. Experience demonstrates that the limitations of section 11 are narrow enough even as applied to the general needs of the municipalities which that section governs. The provisions of section 12 were not designed to cut down the annual revenue intended for the ordinary wants of the local governments. But such a cutting down would be imperative, if the first alternative ruling, already discussed, were adopted.
>
> "On the other hand, the terms of section 12 are not so drawn as to permit the conclusion that the tax levied under them was intended to be any such myth as it would be if it depended only on a surplus remaining, each year, from the rates levied under section 11.
>
> "The only escape from these results is in the reading of those sections which we have above attempted to justify, namely: That the tax expressly authorized in the last lines of section 12 may be imposed in excess of the rates named in section 11, if the other limitations in section 12 are observed."

In this case the question had been submitted to the people and received their approval, but the question was whether it was a thing that could be authorized, even by a vote of the people.

Your inquiry is silent as to whether the bond issue voted on by the people, assuming such to be a fact, also carried the provision authorizing the levy of the tax with which to pay the bonds. With this situation at hand, we assume that no question has been submitted to the people or approved by them authorizing the levy of a tax with which to pay the bonds and interest.

In the case of Consolidated School District v. Day, 328 Mo. 1105 (1931), Court EnBanc, the object sought was a pro forma decree authorizing the issuance of $11,500 in school bonds. The defendant intervener contended that the question of the issuance of said bonds and the levying of a tax in payment thereof were not submitted to the voters of the school district as provided by Section 11 of Article X of the Constitution, and that the indebtedness alleged to have been incurred and evidenced by the judgments in the case was in violation of the provisions of Section 12 of Article X of the Constitution in that it was an attempt to cause the district to become indebted to an amount exceeding the income or revenue provided by said school district for the year without the assent of two-thirds of the voters of the district.

They also charged that Section 2892 was unconstitutional, but this latter question was not preserved for review. It was admitted at the trial that no election was held in said school district to authorize the issuance of the bonds in question and that the amount of said bonds and the amount of the current expenses of said school district exceeded the estimated income and revenue for that year. These bonds were issued for the purpose of paying off two judgments which had previously been obtained totaling $11,069.03. At page 1113 of the opinion is the following:

> "In view of the express provision clearly appearing in the petition and proof as a part of the school board's resolution authorizing the issuance of said bonds, to-wit, that none of said bonds should be delivered or become binding obligations of said district until said judgments were fully satisfied and recorded, seems to hold that the issuance of said bonds does not create a new or additional indebtedness apart from said judgment indebtedness. It only changes the form of the judgment indebtedness. This feature clearly distinguishes the instant case from that of State ex rel. Clark County v. Hackmann, 280 Mo. 686, 703, 708, 218 S.W. 318, cited by respondents, in which the proposed bond issue was not so characterized, and in that case this very distinction was recognized and rather fully discussed. Subsequently, this court en banc said in State ex rel. Sedalia v. Weinrich, 291 Mo. 461, 466, 236 S.W. 872, that 'the great weight of authority is to the effect that the refunding of a valid debt in such manner that the payment

> and extinguishment precedes or is simultaneous with the coming into existence of the refunded debt as an obligation, does not create a new indebtedness or add to the previous one, but merely changes its form. This is true whether the refunding bonds are exchanged for the evidences of the old debt or are sold and the proceeds actually used to extinguish the old at the time and in the manner stated."

And at page 1115, the Court said:

> "The bonds here involved were not issued for the purpose of erecting public school buildings, but to refund a then existing judgment indebtedness, and the rate of levy ordered in connection with their issuance was never submitted to a vote of the people."

At page 1117:

> "The exact question now before us is not the validity of the original judgment indebtedness, but whether or not the laws of the State governing the change in this form of indebtedness to that of a bond issue have been complied with. Surely the above quoted requirement of Section 2895, Revised Statutes 1929, that at the time of issuing the bonds provision shall be made to retire them, is not a mere direction as to form without regard to the validity of such provision. It is a companion section to Section 2892, Revised Statutes 1929, both being a part of the same act which was originally enacted in a somewhat different form (Laws 1879, p. 48), and they should be construed together. The purpose of a law authorizing the funding of such indebtedness is to place it in a form not only advantageous to the seller but affording a reasonably safe and certain means of its collection by the

purchaser of the bonds. When the record shows, as it does in this instance, that at the time bonds are issued the amount of the tax levy necessary to meet the required statutory provision for their retirement exceeds constitutional limitations upon the taxing power one of the chief objects of the bond issue, to-wit, provision for payment of the indebtedness, fails."

CONCLUSION

It is our opinion that the county court of McDonald County does not have authority, absent an election at which two-thirds of the voters express their approval of a tax levy for county purposes in excess of forty cents on the one hundred dollars valuation, to levy an additional tax for county purposes above the forty cents, even though the additional levy be for the payment of bonds and the payment of interest thereon.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

DW:AH

SPECIAL ROAD DISTRICTS: May demand taxes derived from property within district immediately after formation is completed, but cannot receive taxes for fiscal year prior to formation.

H-8

FILED
72

April 6, 1936.

Honorable Thomas V. Proctor,
Prosecuting Attorney,
Monroe County,
Paris, Mo.

Dear Mr. Proctor:

This department is in receipt of your letter of recent date requesting an opinion, as follows:

> "On the 2nd of March, 1936, the voters of the village of Holliday and surrounding vicinity voted to have a special Road District as is provided in Article 9, Chapter 42, R.S. 1929. The said district is 5 miles square and is to be known as the Holliday Special Road District. Since the adoption of the said District, the following question has been confronting us, and we would like to have an opinion from your department concerning same.
>
> "Section 8042 of the above chapter provides that all taxes collected within the bounds of a district, for road and bridge purposes, shall upon proper demand be paid over to the Commissioners of the said District to maintain the roads and bridges in such district. The question now involved is when this money shall be turned over and what money shall be turned over to them. I mean by this, shall only that portion of taxes that has been collected after March 2nd be set aside to their credit, or are they entitled to the money and taxes that have been collected for this year prior to March 2nd, 1936? * * * * "

Section 8042, R.S. Mo. 1929, referred to in your letter, is as follows:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also, one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted

> within the limits of such special road district, or districts."

The question is - can the Holliday Special Road District receive all county taxes levied and collected in said district for road and bridge purposes for the remainder of the year beginning March 2, or is it entitled to receive all moneys collected as provided in Sec. 8042, supra, from January 1, 1936?

Although the section states definitely that the taxes, after the district is organized, shall be paid to the commissioners of the special road district, we are not unmindful of the fact that a part of such taxes have been levied the year previous. In this case the County Court of Monroe County made the levy in May of 1935, the assessment being made in June of that year. Naturally, we would conclude that the levy and assessment accrued before the Special Road District came into existence; hence, the question would arise as to whether or not the district could receive any of the taxes under the levy and assessment of 1935, or any delinquent taxes of prior years. If not, then the Special Road District could not begin receiving taxes until after the levy in May, 1936.

In view of the plain wording of the statute, which states that special road districts are to receive all taxes collected after the formation of the district, and the case of State ex rel. v. Burton, 266 Mo. 711, we are of the opinion that, regardless of when the levy and assessment was made, the district begins receiving the taxes immediately upon the completion of the formation of the district. In the Burton Case, the Court said (l.c. 716):

> "Upon a hearing on the application for the writ of mandamus the circuit court found that defendants had issued warrants in said district for $3303.90 for work done therein, and it was ordered that they pay or issue warrants to plaintiff in the sum of $6030.70, or the balance remaining in the county treasury which had been collected in said district under the twenty-five cent levy.
>
> "Cross appeals were perfected from this judgment, plaintiff contending that it was entitled to the entire revenue collected in said district for the preceding year for road and bridge purposes, and defendants that the statute under which the levy was made was unconstitutional and hence void."

The Court, in discussing the above question, does not discuss our question definitely, but the above quotation contains the finding of the trial court. You will note that the county court had already paid out $3303.90; the trial court held that the sum of $6030.70 should be paid to the commissioners of the special road district. The Supreme Court affirmed this finding of the trial court; therefore, we conclude that it is proper for the district to receive the taxes immediately after its formation, but it cannot receive taxes levied on property in the district prior to its formation.

In the case of State ex rel. Special Road District v. Barry County, 302 Mo. 279, the court held that a special road district is entitled to receive all moneys collected as taxes upon timely application therefor. The Court said (l.c. 290-291):

> "There was no further expression of the legislative mind with respect to these road-tax provisions until 1917. In that year the road law was recast in part. Sections 10481 and 10482 as amended by the Act of 1913 were repealed and what are now Sections 10682 and 10683 covering the same subject-matter were enacted. Section 10594 was in no way referred to in the repealing act. It was therefore not expressly repealed, and there is no ground for holding that it was repealed by implication. As already stated, it was carried into the present revision as Section 10818. The three sections (10682, 10683 and 10818) as they now stand do not indicate any change of the legislative purpose with respect to the distribution of road and bridge taxes collected upon property within special road districts. Section 10683 provides that all that part of the special road and bridge tax which shall be collected and paid upon property lying within any road district shall when paid into the county treasury be placed to the credit of the district from which it arose. Section 10682, which directs the levy of a road and bridge tax in connection with the general levy for county purposes, makes no provision for its distribution. But Section 10818,

> voicing the legislative purpose with respect to special road districts, provides that all money collected 'as county taxes for road purposes, or for road and bridge purposes, by virtue of any... law' upon property within a special road district, shall be set aside to the credit of such special road district. The conclusion that a special road district is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries is unavoidable."

We are further guided in our conclusion that the special road district can only receive taxes after its formation -- not for any part of the fiscal year prior to its formation--by the general construction of the statute. Section 8042, supra, uses the words "shall be collected".

In the case of Minter v. Bradstreet Co., 174 Mo. 444, the Court said: (Syllabi 8)

> "The word 'shall' used in statutes ordinarily applies to something to be done or to take place in the future."

In the case of State ex rel. St. Joseph Lead Co. v. Jones, 270 Mo. 230, the Court said (Syllabi 2):

> "A statute general in terms may be made to apply to conditions non-existent at the time of its enactment. If expressed in words of the present tense, it will generally be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation and applied to such as come into existence thereafter."

In the early case of State ex rel. Parker v. Thompson, 41 Mo. 25, it was held:

> "It is a well settled rule for the construction of statutory law that every act of the Legislature must be held to be prospective in its operation unless a different effect is clearly to be gathered from its terms."

In the case of Supreme Council Royal Arcanum v. Heitzman, 140 Mo. App. 105, the court held:

> "Statutes will be considered to have a prospective operation only unless an intent to the contrary is expressed by or implied from the language used; especially where to construe the Act as retroactive would render it unconstitutional."

CONCLUSION

In view of the wording of Section 8042, supra, there is no language used to indicate that a special road district such as the Holliday Special Road District can demand of the county court any taxes accruing prior to the formation of the district, and in view of the decision in the Burton Case, we are of the opinion that the Holliday Special Road District may only begin demanding or receiving taxes due the district after the date of its formation. To hold otherwise would make section 8042, supra, retroactive and the question of constitutionality might arise.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CITIES
SPECIAL ELECTIONS) Cities of fourth class shall fill vacancy in elective offices by special election, by giving at least 10 days' notice thereof by publication in some newspaper published in city, or at least 20 handbills xhx posted up at as many public places within city.

August 22, 1936

G-24

FILED
72

Honorable John Protiva
Acting Mayor
Willow Springs, Missouri

Dear Sir:

This will acknowledge receipt of your request of August 18, 1936 for an opinion, which request reads as follows:

> "An emergency has arisen in our city affairs due to the death of our Mayor , Dr. Chas. Palenske. I am unable to find any ordinance covering a special election to fill a vacancy due to death. Will appreciate it very much if you will let me know the proper procedure under the State Statutes to fill this vacancy. I am acting mayor by virtue of orders from the late Dr. Palenske, who appointed me as such when he left for his vacation, and since Dr. Palenske died before he returned to this city I am still acting in the capacity as mayor."

We note from your above request that you have been unable to find any ordinance covering a special election to fill the vacancy, and in that respct your attention is directed to Section 7289, R. S. Mo. 1929 relating to cities passing ordinances in conformity with the State law upon the same subject.

> "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or

> authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

In the case of State ex rel. Brown v. McMillan, 108 Mo., l.c.161, the Supreme Court, in discussing what is now the above quoted section of our law, said:

> " ** the power of the legislature to regulate elections, and to amend the laws pertaining thereto in nowise infringes any property or vested right of the said city, and the inhabitants of that city are as much bound to obey a general law of this character as any other portion of the state, and besides that section 1902 expressly provides that 'any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to, and in conformity with, the state law upon the same subject.' This section by force of law is a part of its charter * * "

Thus it may be seen that even though your city has passed no ordinance relating to the filling of vacancies by special election, that Section 7289, supra, is by force of the law, a part of its charter.

Your city, being one of the fourth class and subject to the general law respecting cities of the fourth class, your attention is further directed to Section 6973, R. S. Mo. 1929, which provides for special elections. It provides in part as follows:

> "If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special

> election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city: Provided, that when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment."

It is evident from the above section that should a vacancy occur in any elective office, the mayor, or the person exercising the duties of mayor, shall cause a special election to be held to fill such vacancy. Ten days' notice of such special election shall be by publication in some newspaper published in the city or at least twenty handbills shall be posted up at as many public places within the city. In the event a vacancy occurs within six months of a general municipal election, no special election shall be had to fill such vacancy, but the person so exercising the duties of the office vacant shall continue in such office until the general municipal election.

CONCLUSION

It is the opinion of this department that a special election may be had to fill a vacancy in the office of mayor of your city by giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

ADMINISTRATION: Title passes to widow on order of Probate Court refusing letters of administration, and she is authorized thereby to sue.

November 30, 1936. 12-2

FILED 72

Mr. Earl M. Potts,
Clerk of Probate Court,
Callaway County,
Fulton, Missouri.

Dear Sir:

This acknowledges receipt of your inquiry, which is as follows:

> "This office would greatly appreciate your furnishing it with an opinion on the following subject;
>
> "Whether or not order refusing administration for insufficiency of property will be proper form for a widow or widower to assign, sell, collect, sue for and retain personal property belonging to the deceased at the time of the death of deceased.
>
> "To explain the case a little more definite, I will try to explain the case that came to our attention: T.F. Pierson, a resident of this county, died on or about the 29th day of May, 1936, leaving his widow and one minor child. On the 21st day of November, the widow, Flossy Pierson, petitioned this court for an order for refusal of administration, making affidavit and signing a petition stating that the estate of said deceased did not exceed the sum of Four Hundred Dollars and that the family of the deceased consisted of the widow, Flossie Pierson, and Iva Jewell Pierson, a minor child.
>
> "The deceased died the owner of one Pontiac Coupe, 1928. The title was in the name of the deceased at the time of his death. I prepared the title so as the purchaser could secure his title to the car and used the form printed on the back of the title, 'Assignment of Title', in the following manner:

"For Value received I/we hereby sell, assign or transfer unto

John Landers
Name of purchaser

Address R.F.D #6 Fulton Callaway Missouri
Street City County State

The motor vehicle described on the reverse side of the Certificate and I/we hereby warrant the title to said motor vehicle, and certify that at the time of delivery the same is subject to the following liens or encumbrances and none other.

Amount	Kind	Date	Favor of

Flossie Pierson
Signature of Assignor.
Flossie Pierson,
Widow of T.F. Pierson, deceased.

"On this 21st day of November, 1936, before me personally appeared Flossie Pierson, to me known to be the party described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my seal on the day and year last above written.

Earl M. Potts
Clerk of Probate Court,
Fulton, Callaway Co., Missouri.

"This title as executed in my presence was presented to the Secretary of State's Office, accompanied with the attached order from this court. The employee waiting on the purchaser of this car contends that it would be necessary for the widow to assign the car to herself and then assign to the purchaser.

"In the first place by the widow receiving the order refusing administration for insufficiency of property, we contend places the property in her hands by such a court order. In the second place she could not assign any property to herself. She, it would seem to this court, would be in the same place as an administrator, executor, guardian and curator, and they, of course, are prohibited by law from doing business with themselves.

"Judge Lamar has been Judge of this court for 14 years

and never before have they refused to issue a title in the manner above set forth, however, of course this does not make such procedure correct. Therefore, this court would greatly appreciate an opinion from your office."

Section 2 of Article I, Chapter 1, R.S. Mo. 1929 provides as follows:

"The probate court, or the judge thereof in vacation, in its or his discretion, may refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children under the age of eighteen years. Proof may be allowed by or on behalf of such widower, widow or minor children before the probate court or judge thereof of the value and nature of such estate, and if such court or judge shall be satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, he or it shall order that no letters of administration shall be issued on such estate, unless, on the application of creditors or other parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow or minor children shall be authorized to collect, sue for and retain all the property belonging to such estate; if a widower or widow, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of eighteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suits."

In the case of Perkins v. Goddin, 111 Mo. App. 429, l.c. 438, the Court said:

> "Under the well-settled law of this state, on the death of a party, the personal property passes to the administrator, not to the heir, unless it be where the probate court, by order dispenses with an administrator under Section 2 of the Administration Statute. R.S. 1899. There was nothing of that kind in this case as shown by the fact that the Boone County Probate Court took up the administration and granted letters to appellant thereon."

In the case of Estate of Ulrici v. Johnston, 177 Mo. App. 584, the question was whether the costs of administration should first be paid and then the residue turned over to the widow as her absolute allowance when such residue would thereby be depleted to an amount less than the amount allowed as the absolute allowance to the widow. The Court held that the $400 absolute allowance went direct to the widow and was her property stripped of the payment of the costs of litigation, and said (l.c. 589):

> "It is not essential to consider the matter of good faith of the administrator here, as these allowances are given by the statute to the widow first of all other claims, and this includes the expense of administration, for they are not of the estate. Indeed, if there is not sufficient to pay them and the expense of administration besides, then no administration should be had."

And at page 590, the following:

> " * * * but the Supreme Court has declared in plain terms, time and again, that the property enumerated in the statute and the allowance provided for are the absolute property of the widow and not parcel of the decedent's estate."

And at page 592, speaking of the Administration Law, the Court says:

> " * * * it provides that if the estate is no greater in amount than

> is allowed by law as the absolute property of the widow, administration shall be dispensed with entirely. It is certain that, under the established rule of decision in this state, the widow's allowances are regarded as her absolute property and not to be considered as assets of the estate. The cases are multiplied which declare such to be true. In those states where the courts so construe these statutes, the rule obtains as well that the allowances go free to the widow first of the expenses of administration of the estate."

In the case of Jacobs v. Maloney, 64 Mo. App. 270, l.c. 272, the Court says:

> "Neither the plaintiff nor anyone else, at the time of the transaction just stated, had been appointed or qualified as administrator of the estate of said deceased, nor does it appear that the probate court had made an order as provided in Section 2, Revised Statutes, authorizing plaintiff to collect, sue for, and retain all the property belonging to the estate of his father, * * * "

In the case of McMillan v. Wacker, 57 Mo. App. 220, l.c. 222, the Court says:

> "On the death of a party the personal property passes to the administrator, and he alone has a right to the possession thereof, unless indeed the probate court shall, by order, dispense with any administration, as provided for by section 2 of the administration statute. It is only 'after making such order such widow or minor children shall be authorized to collect, sue for and retain the property belonging to such estate.' R.S. 1889, Sec. 2. The probate court is the only tribunal having original jurisdiction to determine the question as to whether or not an administration is necessary."

CONCLUSION

It is our opinion that upon the death of the deceased, T.F. Pierson, the question of administration on his estate was properly brought to the attention of the Probate Court having jurisdiction thereof, and that Probate Court was invested with the authority to determine whether there should be administration granted upon said estate, and that when said Probate Court was "satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, he or it shall order that no letters of administration shall be issued on such estate", and that T.F. Pierson, late of Callaway County, died having at the time of his death personal property in this state not greater in amount than is allowed by law as the absolute property of the widow, and made the further order that the said widow, Flossie Pierson, as such widow, is authorized and empowered to collect, sue for and retain said property as her absolute property, as provided by law, and ordered that letters of administration on said estate be refused unless on the application of creditors or other parties interested the existence of other or further property be shown; that thereupon, said widow, Flossie Pierson, became invested with the authority to transfer the title to the automobile in question.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:AH

ELECTIONS - Fees: Messenger entitled to 5¢ per mile round trip in delivering election returns to Secretary of State.

12-30

December 29, 1936.

FILED
72

Honorable H. Sam Priest,
Clerk of Circuit Court,
Eighth Judicial Circuit of Missouri,
St. Louis, Missouri.

Dear Sir:

We are in receipt of your inquiry, which is as follows:

> "Shortly after the election on November 3, 1936, the returns of the election held here in the City of St. Louis were ordered entered of record by the Circuit Court of this city and I immediately sent said election returns to Jefferson City to Secretary of State by messenger. I sent the election returns by messenger for the reason that they were so bulky that it would have been impossible to have enclosed them in envelopes as provided by Section 10172 of the Revised Statutes of Missouri of 1929.
>
> "Under Section 10171, R.S. 1929, I mailed a bill to the State Auditor for the statutory allowance of five cents per mile for each mile covered, the said messenger going to and coming from Jefferson City, Missouri, the mileage taken being that of the railroad between here and Jefferson City. The State Auditor notified me that he had forwarded my bill to the Secretary of State and on December 5, 1936, I received a letter from Honorable Dwight H. Brown in which he informed me that he could not pay me for the expense of conveying said election returns to Jefferson City as provided by Section 10171, supra. I am enclosing, herewith, a copy of said

> letter of said Secretary of State advising me that said bill will not be paid.
>
> "I do not like to bother you over such a small item, but I believe that you can determine whether or not said bill should be allowed very summarily by reading Section 10171 and I should like to be able to reimburse the deputy from this office who conveyed said election returns to Jefferson City for the expense to which he was put by said trip."

Section 10166, R.S. Mo. 1929 provides that at stated times elections shall be held for various state officials; likewise does Section 10167. Section 10168 provides that it is the duty of the Secretary of State to lay before the House and Senate the list of members elected thereto. Section 10169 provides for the method of casting up the returns. Section 10170 provides a method for selection in case of a tie.

Section 10171, R.S. Mo. 1929 is as follows:

> "There shall be allowed to the clerks for sending or conveying the returns of any senatorial election into any other county in the district, as occasion may require, and also to any messenger who may be employed to convey the returns of any election required by law to be made to the Secretary of State, at the rate of five cents per mile going and returning."

Section 10172 provides that the clerks of the several courts to whom a transcript of the votes is directed shall, within two days after the time limited for the examination of the polls, deliver to the post office a fair abstract of the votes given in their respective counties, by precincts, for members of Congress, Governor, Lieutenant Governor, etc., and provides a method of preparing the same for mailing.

Section 10173 authorizes the Secretary of State to send a special messenger in order to procure the election returns if they are not received promptly by him otherwise. Section 10174 places a penalty on the clerk for failure to properly transmit said

election returns.

Section 10175, R.S. Mo. 1929 provides that the Secretary of State, in the presence of the Governor, shall open the returns and cast up the votes given for all candidates for any office except certain ones therein named, and issue commissions for them.

You state in your letter that the election returns of a regular election were forwarded by messenger from St. Louis to the Secretary of State at Jefferson City. It will be noted that Section 10171 provides "There shall be allowed to the clerks for sending * * * any messenger who may be employed to convey the returns of any election required by law to be made to the Secretary of State at the rate of five cents per mile going and returning." This latter provision cannot refer to the messenger provided for by Section 10173 because the clerk does not send that messenger, but on the contrary the Secretary of State does.

It appears that the returns of this election "are required by law to be made to the Secretary of State" and that you elected to send them by messenger rather than by the postal facilities because it was more economical to send them by messenger. It appears to us that Section 10171 refers to just such a situation as is presented by your inquiry, and while ordinarily the returns are transmitted by mail, yet the clerk may use a sound discretion in deciding to send such returns by messenger, and when so done, the provisions of Section 10171 apply; therefore, such messenger is entitled to his expenses in going and returning at the rate of five cents per mile therefor.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW:AH

PROSECUTING ATTORNEYS: May retain as own fees provided in Section 7887, R. S. Mo. 1929, in addition to salary.

April 14, 1936.

4-20

FILED
73

Hon. Owen C. Rawlings,
Prosecuting Attorney,
Marshall, Missouri.

Dear Sir:

We have your request for an opinion under date of April 8, 1936, as follows:

> "Please advise me as to whether or not a prosecuting attorney for Saline County, Missouri, can legally retain as his own the fees provided in Section 7887 of the Revised Statutes of Missouri, 1929, when earned in poll tax suits prosecuted by him on behalf of the commissioners of special road districts in Saline County, Missouri."

Section 7887, R. S. of Mo. 1929, provides that:

> "The prosecuting attorneys shall appear in behalf of the road districts of their respective counties when suits are brought against poll tax payers, and shall receive a fee of five dollars for each judgment obtained against the defendant, which shall be taxed against the defendant as other costs in the case. Said fee shall be retained by the prosecuting attorneys <u>in addition to their salaries</u>, to cover their expenses in attending on the trial of said causes: <u>Provided</u>, that no such fee shall be recovered against any defendant unless the same shall be separately stated in summons and said defendant thereby fully notified and given an opportunity to pay such tax and avoid judgment."

The above section provides that the fee is to be retained by the prosecuting attorney in addition to his salary, to cover his expenses in attending the trial.

Section 11315, R. S. of Mo. 1929, provides that:

> "It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the clerk of the county court, and shall at the end of every quarter make out an itemized and accurate list of all fees in his office which have been collected by him, and one of all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid--said report to be verified by affidavit--and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when collected to be turned over to the county treasury."

The question presented is whether by virtue of Section 7887, supra, the fee can be legally retained by the prosecuting attorney in addition to his salary, or whether same, when collected, must be accounted for and turned over to the state treasury.

In the case of Duff v. Karr, 91 Mo. App. 1. c. 21, the court said:

> "Courts are warranted in considering the prior state of the law and changes in the law in ascertaining the purpose of any statute. It is the intent of the law which furnishes the best light to reach its meaning."

Section 11315, supra, first made its appearance in the statutes in the Session Acts of 1913, p. 109.

Section 7887, supra, first made its appearance in the statutes in the Session Acts of 1917, Sec. 34, p. 457.

After the enactment of Section 11315, supra, in the year 1913, the prosecuting attorney could no longer look to the various fees provided his office to supplement his salary, but must turn same over to the county treasury. Such was the state of the law when Section 7887, supra, was enacted four years later in 1917.

It is apparent from the history of the two sections that the Legislature intended to except from the provisions of Section 11315, supra, the fee earned by the prosecuting attorney, and to allow the latter to retain same in addition to his salary, to cover his expenses in attending trial in behalf of special road districts for delinquent poll tax.

In view of the foregoing, we are of the opinion that the prosecuting attorney for Saline County, Missouri, can legally retain as his own the fees provided in Section 7887, R. S. Mo. 1929, when earned in poll tax suits prosecuted by him on behalf of the commissioners of special road districts in Saline County, Missouri.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

MW:HR

COUNTY SURVEYOR: County surveyor may only charge persons for whom he makes surveys the legal fees specified in Section 11803, R.S.Mo.1929.

7/21

May 28, 1936

FILED
73

Hon. Owan C. Rawlings
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Rawlings:

This is to acknowledge your letter as follows:

> "Please advise me as to whether the County Surveyor of Saline County, being a county of between 30,000 and 40,000 population, is limited in his charge as compensation to the items set out as fees under section 11803 in the Revised Statutes of Missouri, 1929; or can he legally charge a per diem fee - all of such charges of course, to be paid by the parties who request the private survey."

The office of county surveyor is an elective one. In State ex rel. Koehler v. Bulger 233 S. W. 486, l. c. 487, the Supreme Court of Missouri, in banc, said:

> "The county surveyor and his duties and fees are fixed by Chapter 117, R.S. 1919. It is an ancient office coming to us from territorial days. "

Chapter 75, R. S. Mo. 1929 pertains to 'surveyors.' Section 11580, R. S. 1929, reads as follows:

> "The county surveyor shall,within ten days, when called upon, survey any tract of land or town lot lying in his county, at the expense of the person demanding the same: Provided, that his legal fees are first tendered, or that he and his deputies are not engaged in executing previous orders of survey."

A reading of said section shows that it is mandatory upon the county surveyor to make surveys 'at the expense of the person demanding the same.'

Section 11803, R. S. 1929, provides for the fees that the county surveyor can charge for his services, and is as follows:

> "County surveyors shall be allowed fees for their services as follows: For calculating the quantity of land in each survey, when called upon by any party, the sum of thirty cents for each distance contained in the boundary of said survey.
>
> "For every survey actually made . . . . . $1.50.
>
> "And the further sum of one cent for every chain lineal measure above one hundred chains.
>
> "For calculating the quantity of each division made in a tract

of land, town lots excepted, .$ .75

"For making each plat. 40

"For recording a plat and certificate. 50

"For every copy of a plant and certificate. 50

"For traveling to the place of survey and returning, for every mile. 08

"For ascertaining and planting each corner, under article 7, chapter on 'Evidence'. 1.00

"For recording each certificate under article 6, chapter on 'Evidence' . . . 1.00

"For each day's attendance as a witness under article 6, chapter on 'Evidence'. . 1.50

"For delivering depositions to the recorder under article 6, chapter on 'Evidence'. . .35

In State ex rel. Koehler v. Bulger, supra, the Court said, l. c. 489:

> "As said, the salary of the county surveyor was fixed by law."

From the above and foregoing, it is our opinion that the county surveyor may only charge the fees

listed in Section 11803 and cannot make an extra per diem charge and collect same legally.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JLH:LC

SHERIFFS: Liable personally on official bond for negligence in performing duty.

PEADE OFFICERS:

March 9, 1936

3-10

FILED 74

Honorable E. L. Redman
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Sir:

This department wishes to acknowledge your request for an opinion under date of February 27th, wherein you state as follows:

> "Several months ago the sheriff of our county was conveying by automobile to the reformatory, two boys, whom the Court had sentenced to four years at Boonville, under the juvenile code, with a delinquent charge of burglary, and on the way down, his car skidded and struck an abutment on a railroad bridge, shaking up the occupants in the car and breaking a leg of one of the boy prisoners.
>
> "Query: Is a sheriff, and or his bondsmen, liable for ordinary acts of negligence which result in injury to a prisoner while the sheriff is executing a process issued by the Court to convey a prisoner to a state institution for confinement, or is liability, if there is liability, limited to cases where negligence is gross and wanton, and amounting to culpability?"

I.

Sheriff is liable for acts of negligence while engaged in performance of duty.

We wish to point out in the beginning that we are not passing on the question of whether, under the facts as set out in your letter, the sheriff was guilty of negligence, but are confining our opinion strictly to the question asked.

We have searched the authorities carefully and have been unable to find any Missouri cases on the question propounded. However, we are of the opinion that our court would be inclined to follow the following decisions.

In the case of Floric v. Mayor and Aldermen of Jersey City, 129 Atl. 470, l. c. 471, 472, 473, the court said:

> "We now approach the consideration of the question whether Schmolze, he being a servant of the city in the discharge of a public duty, can be properly held liable for the consequences of his negligent act in the performance of such public duty.
>
> "In Oliver Nowell & Wife v. Wright, 3 Allen (Mass.) 166, 80 Am. Dec. 62, Dewey, J., at page 167, very aptly remarks:
>
> "'It may be a delicate if not a difficult task, to mark with precision the line of discrimination between the various classes of public officers or agents created by statute and whose duties are defined by statute, who may be held responsible to individuals in an action on the case, for injuries resulting from the improper execution of their official duties. That many such officers and agents have been so held responsible, the adjudged cases abundantly show.'
>
> * * * * *
>
> "Schmolze, the defendant below, was a servant of the city of Jersey City charged with the performance of a certain public duty or

> service which was to drive a fire truck through the public streets to go to fires for the protection of property and oftentimes of life. This duty is concededly a highly important and grave function to perform. But it would be a travesty upon both law and justice to hold, that, because of the gravity and importance of the duties cast upon him, he has become clothed with the privilege, while in the act of performing such duties, to thrust aside all ordinary prudence in driving along the public streets to the great hazard of life and limb of men, women, and children of all classes and conditions, who may be upon the public highway. He must answer for his negligence, though in the performance of a public duty, in the same manner as if he were an individual in private life and had committed a wrong to the injury of another. The servant of the munidpality is required to perform his duty in a proper and careful manner, and when he negligently fails to do so, and in the performance of his duty negligently injures another, his official cloak cannot properly be permitted to shield him against answering for his wrongful act to him who has suffered injury thereby.
>
> * * * * *
>
> "We think that a sound public policy requires that public officers and employees shall be held accountable for their negligent acts in the performance of their official duties, to those who suffer injury by reason of their misconduct. Public office or employment should not be made a shield to protect careless public officials from the consequences of their misfeasances in the performance of their public duties."

And to the same effect is the case of Falasco v. Hulen, decided April 17, 1935, and reported in 44 Pac. (2d) 469, l. c. 477, wherein the court said:

"Public officers, which includes, of course, sheriffs and constables, are not relieved from liability for acts of negligence. Perkins v. Blauth, 163 Cal. 782, 127 P. 50, dealing with officers of reclamation districts; Proper v. Sutter Drainage District, 53 Cal. App. 576, 200 P. 664, dealing with the same class of officers; Pilarski v. Covey, 75 Cal. App. 353, 242 P. 874, dealing with sheriffs and deputy sheriffs; Wolfsen v. Wheeler, 130 Cal. App. 475, 19 P. (2d) 1004, dealing with officers whose duties were to exterminate rodents and other pests; notes in 1. A. L. R. beginning on page 236, treating of duties of sheriffs and deputy sheriffs; Manwaring v. Geisler, 191 Ky. 532, 230 S. W. 918, 18 A. L. R. 192. We quote from the syllabus: 'A police officer is not exonerated from liability for an injury to another while in the discharge of official duties on the ground of public necessity, if he failed to exercise reasonable care to protect those whom he knew, or by exercise of reasonable judgment should have expected, to be at the place of the injury.' See, also, notes to the same case, 18 A. L.R. beginning on page 197, under the caption, 'A peace officer is generally held to be personally liable for negligent or wrongful acts causing personal injury or death."

To the same effect is the case of Florio v. Mayor and Aldermen of Jersey City, 101 N. J. Law. 535, 129 A. 470, 40 A. L. R. 1353, and notes beginning on page 1358."

39 A. L. R. 1306, in its annotation on the "Personal liability of peace officer or his bond for negligence causing personal injury or death," declares that:

"The present annotation on personal liability of a peace officer or his bond for negligence causing personal injury or death is supplemental to an earlier annotation on the same topic in 18 A. L. R. 197.

> "The recent cases affirm the rule stated in the earlier note, to the effect that a peace officer may be held personally liable for negligent or wrongful acts causing personal injury or death."

Section 11518, R. S. Mo. 1929, provides, among other things, that the sheriff shall

> "* * * execute all process directed to him by legal authority * * * ."

Hence, the sheriff in conveying the prisoners to the reformatory was discharging an official duty.

From the foregoing, we are of the opinion that the sheriff is personally liable for ordinary acts of negligence which result in an injury to a prisoner while he is executing a process issued by the court, and such liability is not limited to cases where negligence is gross and wanton and amounting to culpability.

II.

Surety is liable on official bond for sheriff's acts of negligence while engaged in performance of duty.

In 24 R. C. L., page 965, Sec. 59, in speaking of the test of liability of a surety on a sheriff's bond, it is said:

> "The test should be: Would he have acted in the particular instance if he were not clothed with his official character, or would he have so acted if he were not an officer? If he assumed to act as an officer--whether under valid or void process, or under no process whatever--the bondsmen should be held, as he is held, for they are the sponsors of his integrity as an officer while acting as such. They should not be absolved from liability for reasons which if carried to their logical extreme would make them responsible only

> for legal or authorized acts (where of course there is no liability) and excuse them from liability where acts are in excess of or apart from his authority-- the very acts which they are supposed to assure against and which constitute the only logical contingency for entering upon their obligation as sureties. Under such a test as this, it is clear that the distinctions drawn out at interminable length in the authorities as between acts virtute officii and acts colore officii would be deemed of little if any use in practice inasmuch as, from their very nature, they are mere argumentations in a circle."

39 A. L. R. 1306, in discussing the liability of a peace officer on his bond, which includes that of a sheriff, declares that:

> "Whether the surety on the bond of a peace officer is liable for personal injury or death due to the wrongful or negligent manner in which the officer performs his duties depends on the provision of the bond and whether the act is in the performance of duty. See Rice v. Lavin (KY.); Fidelity & C. Co. v. Boehnlein (Ky.); Dean v. Brannon (Miss.); Jackson v. Harries (Utah); and State ex rel. Sonner v. Dean (W.Va.) supra. And see Geros.v. Harries (reported herewith).
>
> "It was said in Jackson v. Harries (Utah) supra, that sureties on the official bond of a peace officer may be held liable in cases where the officer committed a wrong, only while he is acting in his official capacity.
>
> "Also, in Fidelity & C. Co. v. Boehnlein (Ky.) supra, it was held that the surety upon a policeman's bond was liable, where the officer, acting in the capacity of a motorcycle policeman, negligently ran into

and injured the plaintiff. It appeared that the official bond covenanted to stand bond in the sum of $1,000 that the policeman should well and faithfully discharge the duties of his office as policeman. The court said: 'When the bond was executed, the board of public safety had plenary power in assigning a policeman for duty to any department of the police service; and he is still a policeman, whether serving as a traffic officer, walking or riding a beat, or performing any of the many duties a policeman can be required as such to do. Appellant executed the bond with full knowledge of these facts, and to hold that for every change in a policeman's duties his bondsmen were released, or not bound, unless notified of the change, would render the execution of such bonds a farce. . . . . By all the authorities, an official bond for the faithful performance of official duties covers misfeasance, malfeasance, and nonfeasance, as counsel for appellant concede, but their argument assumes negligence in the operation of a motorcycle by a policeman is none of these. Such an assumption has neither authority nor reason to support it. . . . In driving the motorcycle he was doing precisely what his duties require him to do, and what he had no right to do except in the discharge of his official duty. He had neither the right to patrol the beat nor drive the motorcycle except as a policeman, and there is no intimation in either the pleadings or the proof that anything he did (except his negligence) was not done in the discharge of his official duty. He was therefore driving the motorcycle by authority of his office, and it was only because of his negligent performance of his official duty that he struck and injured plaintiff. It necessarily follows that the surety upon his official bond is liable for such negligence upon its covenant that he would well and faithfully discharge his duties as a policeman.'"

Section 11507, R. S. Mo. 1929, provides that the sheriff shall give bond

> " * * * conditioned for the faithful discharge of his duties."

The above language is similar to the condition in the bond required of the bondsmen in the Boehnlein case, supra, wherein the surety was held liable.

From the foregoing, we are of the opinion that a surety is liable upon his official bond for ordinary acts of negligence by a sheriff which result in an injury to a prisoner while such sheriff is discharging an official duty, and that such liability is not limited to cases where negligence is gross and wanton and amounting to culpability.

Respectfully submitted,

Wm. ORR SAWYERS
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

WOS:MW:sw

SALE OF DELINQUENT PROPERTY - When surplus exists from sale of land for taxes, Collector may pay same to person legally entitled thereto; if two parties claim same, collector shall pay it to the County Treasury and county court may determine claims and pay to proper person any time within 20 years.

January 2, 1936.

FILED
75

Honorable Nat B. Rieger,
Prosecuting Attorney,
Adair County,
Kirksville, Missouri.

Dear Sir:

This department is in receipt of your letter of December 19 wherein you request an interpretation of Section 9953c, Laws of Missouri 1933, p. 433. Your letter is as follows:

> "Please give me an official opinion on the construction of Section 9953c of the Laws of 1933, found at page 433, and with particular attention to the following:
>
> > 'You shall pay the surplus, if any, to the person entitled thereto; or if any doubt or a dispute arises as to the proper person, the same shall be paid to the County Treasury to be held for the use and benefit of the person entitled thereto.'
>
> "I particularly want to know whether the County Treasurer, in the event of a dispute, is privileged to pay out said money to claimants on his judgment, or on the order of the County Court; or whether he must hold said funds pending the direction of a decree or judgment of the Circuit Court.
>
> "There have been a number of the sales provided for in this statute held here in which a surplus has been had and paid to the County Treasurer, and he is in doubt whether to pay out these funds at the direction of the County Court or not."

Section 9953c, Laws of Missouri 1933, p. 433, provides in part as follows:

> "Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto.****"

Section 9959, Laws of Mo. 1933, p. 428 relates further to any surplus or unclaimed money which might result from the foreclosure or sale of land for taxes and is as follows:

> "When real estate has been sold for taxes or other debt by the sheriff or collector of any county within the State of Missouri, and the same sells for a greater amount than the debt or taxes and all costs in the case, and the owner or owners, agent or agents cannot be found, it shall be the duty of the sheriff or collector of the county, when such sale has been or may hereafter be made, to make a written statement describing each parcel or tract of land sold by him for a greater amount than the debt or taxes and all costs in the case, and for which no owner or owners, agent or agents can be found, together with the amount of surplus money in each case, which statement shall be subscribed and sworn to by the sheriff or collector making the same before some officer competent to administer oaths within this state, and then presented to the county court of the county where such sale has been or may hereafter be made; and on the approval of the statement by the court, the sheriff or collector making the same shall pay the said surplus money into the county treasury,

take the receipt in duplicate of said treasurer for said overplus of money and retain one of the said duplicate receipts himself and file the other with the county court, and thereupon the court shall charge said treasurer with said amount. And said treasurer shall place such moneys to the credit of the school fund of the county, to be held in trust for the term of twenty years for the owner or owners or their legal representatives. And at the end of twenty years, if such fund shall not be called for, then it shall become a permanent school fund of the county. County courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

CONCLUSION

In view of the foregoing, it is the opinion of this department that Sections 9953c and 9959 are to be read in conjunction with each other. Therefore, if under Section 9953c there is a surplus resulting from the sale of land for taxes, the county collector may pay the same to the person legally entitled thereto.

If the county collector be in doubt as to the proper person entitled thereto, and if said surplus be claimed by two persons, a dispute thereby arising, the county collector shall pay the same in to the county treasury. Claimants may then follow the surplus and according to the provisions of Section 9959, (Laws of Mo. 1933, p. 428), may present their contentions or claims to the county court, which court has authority, on satisfactory proof, to pay to the proper person the surplus at any time within twenty years.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

DENTAL BOARD: Application and fee for reinstatement of certificate of registration.

February 21, 1936. 2-21

FILED 15

Missouri Dental Board
Jefferson City, Missouri

Attention of Doctor R. R. Rhoades, Secretary.

Dear Doctor Rhoades:

You have requested an opinion of this office on the following matter:

> "What our Board wants is a definite procedure to follow in reinstating a certificate of registration after it has been revoked for non payment of the annual one dollar license fee."

I regret that we have been unable to get this opinion to you sooner and am glad to herewith give our views in respect to the matter presented.

> A LICENSEE, WHOSE CERTIFICATE OF REGISTRATION IS ONCE REVOKED, MAY OBTAIN REINSTATEMENT UPON MAKING APPLICATION ACCOMPANIED BY FEE OF TWENTY-FIVE DOLLARS.

Section 13566 Revised Statutes of Missouri 1929, sets out the reasons for which a certificate of registration or a license may be revoked. Paragraph eight thereof provides in part as follows:

> "In case any registered dentist should fail for the space of one year after the 30th day of November in any year to procure from said dental board a license as provided by this chapter, such failure shall be ground upon which said dental board may revoke and annul the certificate of registration theretofore issued to such delinquent person."

By virtue of the foregoing provision it is specifically made a ground for revocation of the certificate of registration for any dentist to fail to pay the annual renewal fee of One Dollar and continue such failure for a period of one year following the 30th of November of any given year. Of course, this contemplates that the same procedure shall be followed for the revocation of such a certificate as is required to be following to revoke the certificate of registration or the license for any other cause, to-wit, after due notice and hearing. A preceding section requires the filing of the certificate of registration with the Clerk of the County Court in the County wherein the licensee is practicing. This Section further provides:

> "If a certificate of registration is once forfeited for failure to comply with this chapter, then the person therein named may obtain a new certificate of registration only upon his or her making application therefor and by paying to said dental board a fee of twenty-five dollars ($25.00): Provided, the applicant is entitled at the time of receiving such renewed certificate of registration to receive and hold the same: Provided further, however, that if a certificate of registration be revoked a second time, the person therein named shall not be entitled to receive a renewal certificate of registration at any time thereafter:* * * *"

In the event the licensee is a first offender he may make an application for reinstatement of his certificate and obtain a reinstatement of the same by paying the additional fee of Twenty-five dollars. The form of such application, in the event reinstatement is sought because of revocation of certificate for failure to pay the annual license fee, is not set forth in the statutes. It would appear that such information should be contained in that application as would warrant the board in reissuing the certificate of registration. The application should of course contain sufficient information to enable the board to identify the applicant as one having been previously registered in this state, and such information as would enable the Secretary

to identify the applicant from the records in the possession of the board. It would seem appropriate that the applicant make some representation as to his future conduct in respect to the prompt payment of the renewal fee. It might be well for the Board to adopt a uniform application to be used in such cases or to have the same prepared. In the event you should desire this office to examine any such proposed form we shall be glad to do so.

CONCLUSION.

It is therefore the opinion of this office that the Board may entertain application for reinstatement of a certificate of registration revoked for cause of failure to pay the annual license fee and that such application should be accompanied by the payment of a Twenty-five Dollar reinstatement fee.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

DRAINAGE DISTRICTS: (1) Lien for drainage district taxes does not become extinguished until deed is delivered; (2) Purchaser of land conveyed under Sec. 9957a, Laws of Mo. 1933, p. 438, does not acquire title free from future levy of drainage district taxes because of unused and unlevied benefits; (3) Drainage district may redeem land sold for delinquent state or county taxes to protect their interest Sec. 10766, R. S. 1929.

TAXATION:

September 3, 1936.

10-6

FILED
75

Honorable Nat B. Rieger
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Mr. Rieger:

This is to acknowledge your letter dated September 1, 1936, as follows:

> "Will you please give me the opinion of your department on questions set out below?
>
> "Land is to be sold by the County Collector for delinquent state and county taxes under the authority of Sections 9952 to 9963 (page 430 to 450, Laws of Missouri, 1933). The land lies in a drainage district organized under Article 1, Chapter 64, R. S. Missouri, 1929. It was assessed with benefits of $40.00 per acre to pay for the improvements and there are now delinquent district drainage taxes for a portion of those assessed benefits and there remains some of those assessed benefits for which installments of drainage taxes have not been yet levied.
>
> "1.) Will the purchaser at the sale, in the event that the district does not redeem the land, acquire a title free from any lien on account of the delinquent district drainage taxes?

"(2.) Will the purchaser at the sale, in the event that the district does not redeem the land, acquire a title free from any future levy of drainage district taxes on account of the unused and unlevied benefits?

(3.) Does the drainage district have such an interest in the land as to authorize it to redeem under such law?"

I.

Will the purchaser at the sale, in the event that the district does not redeem the land, acquire a title free from any lien on account of the delinquent district drainage taxes?

As stated in your letter we are concerned only with drainage districts organized by the circuit court by virtue of Article 1, Chapter 64, R. S. Mo. 1929.

Prior to the enactment of Senate Bill No. 94 (Laws of Missouri, 1933, pages 425 to 449) the State's lien for delinquent and back taxes was forclosed by a suit in the circuit court. However, with the enactment of Senate Bill 94 a radical change was made and "It expressly repealed numerous sections of the former statute and particularly Section 9952, authorizing such suits, and substituting a scheme for foreclosure by sale by the collector at the courthouse door on the first Monday in each year, upon published notice thereof, and without resort to judicial proceedings--the general statutory plan prevailing prior to the year 1877." State ex rel.v.Bader, 78 S. W. (2d) 835, 837.

Section 9952a of Senate Bill 94 provides in part as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of

> "November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; * * * *"

A reading of the above section shows that it is not now necessary when the State's lien is foreclosed to apprise the owner or any person having a lien or interest in said land. This is radically different from the suit previously brought in the circuit court which extinguished any and all liens if such were parties to the suit. Little River Drainage District v. Sheppard, 7 S. W. (2d) 1013. The delinquent land list is published. Section 9952b. When the land is offered for sale the first time and no bid is received which is sufficient in order to pay the tax, costs and expenses, then the land is reoffered for sale a second time, and failure to receive the proper amount of tax, costs and expenses the second time, the land is offered the third time, at which time it is struck off to the highest bidder. Sections 9953 and 9953a.

When land is sold for delinquent and unpaid taxes the county collector gives to the highest bidder a certificate of purchase. Section 9953d. The purchaser of said certificate may get possession of the premises one year after date of sale, by virtue of Section 9954a, and at the expiration of two years if the property has not been redeemed it is conveyed to the holder of the certificate of purchase by the county collector by a form of conveyance which is "prima facie evidence of a good and valid title in fee simple." Section 9957a.

Section 9956a provides in part as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: * * * "

By Senate Bill 94 we thus have a complete scheme for the foreclosing of the State's lien, and specifically gives the right of redemption to any owner or person having an interest therein in said land to redeem same within two years. After a lapse of two years, upon application of the holder of a certificate of purchase, a title in fee simple is given by the county collector.

While you ask the question as to the extinguishing of the lien for delinquent drainage district taxes by virtue of the sale of such land by the county collector, yet, your question is divisible into two parts: (1) Is the lien extinguished at the time the certificate of purchase is issued, or (2) is the lien extinguished at the time the county collector gives a deed two years after the certificate of purchase?

It is our opinion that the liens for drainage district taxes do not become extinguished at the time the certificate of purchase is delivered because of the provision for redemption. Section 9956a. It is our further opinion that when the deed is delivered by virtue of Section 9957a, then drainage district liens for taxes become extinguished and satisfied insofar as such liens apply to the period prior to the issuing of the certificate of purchase.

As Senate Bill 94 was enacted in 1933 we have been unable to find any case that has been adjudicated by the court which is determinative of the question and supporting our conclusion. However, prior to the enactment of Senate Bill 94 many cases were decided by the court on the question involved. In Little River Drainage District v. Sheppard, 7 S. W. (2d) 1013, the court said (p. 1014):

> "The lien for state and county tax shall be paramount. The statute does not say that it shall necessarily destroy the district lien for special taxes. The plaintiff district, according to the stipulation and finding of the trial court, was not made a party to this proceeding. No person or corporation can be affected by a proceeding to which he or it was not made a party, and that applies to tax suits. For instance, the state's lien for taxes is superior to a prior mortgage

> "lien, and a sale under such tax lien conveys title to the purchaser but does not affect the mortgagee's right to redeem."

In said suit the court held that because the drainage district was not made a party to the tax suit that said suit would not have the effect of extinguishing or satisfying the drainage district's lien. However, the court made this pointed observation (p. 1014):

> "If the district had been made a party to the proceeding with an opportunity to meet and pay the general taxes at the time, a different question would be presented for consideration."

Also, in McAnally v. Little River Drainage Dist. et al., 28 S. W. (2d) 650, the Supreme Court of Missouri, en banc, made this remark:

> "Since the ruling in Little River Drainage District v. Sheppard, 320 Mo. 341, 7 S. W. (2d) 1013, respondents concede they lost their lien for delinquent annual installments levied prior to the levy and subsequent sale of the land in question for state and county taxes for the year 1926."

If prior to the enactment of Senate Bill 94 the Drainage District liens (being subordinate to the state liens) became satisfied and extinguished by a suit in the circuit court when the district was named a party to the suit, and it being unnecessary under Section 9952a to name the owner, mortgagee or any person having an interest in said land when such was advertised for sale, two years hence, with the giving of a deed which conveys a fee simple title, the drainage district's lien would be extinguished the same as in the instance when the state's lien previously was foreclosed by suit and the district made a party to same. However, if there is any fraud, collusion or connivance on the part of the owner of said land to permit it to be sold under the state's lien and then bid it in for the purpose of satisfying the drainage district's liens, then the whole procedure would be subject to attack and the drainage district could still enforce its lien.

II.

Will the purchaser at the sale, in the event that the district does not redeem the land, acquire a title free from any future levy of drainage district taxes on account of the unused and unlevied benefits?

We believe that the case of McAnally v. Little River Drainage Dist. et al., 28 S. W. (2d) 650, answers the above question. The court stated(p. 651):

> "Respondents state the question for determination as follows: 'The sole question then presented is whether or not the sale of the land in question for state and county taxes destroys the lien of the districts for unlevied subsequent (future) installments of the estimated total tax.'"

The court held (p. 652):

> "But the lien does not accrue until an annual levy is made. It follows that at the time appellant purchased the land, the owner held title free of, but subject to, the lien of future installments of the estimated total tax. Therefore the sheriff's deed conveyed the land subject to the future attachment of said liens."

Nothing is found in Senate Bill 94 that provides that future drainage district liens become satisfied when property is conveyed by the county collector by deed. Section 9957 does provide, however, in part as follows:

> "If no person shall redeem lands sold for taxes within two years from the sale * * * the collector of the county * * * shall execute * * * a conveyance * * * which shall vest in the grantee an absolute estate in fee simple, subject however to all claims thereon for unpaid taxes

> except such unpaid taxes existing at the time of the purchase of said lands and the lien for which taxes were inferior to the lien for taxes for which said tract of land was sold."

Thus, while delinquent drainage district taxes would be extinguished by virtue of the conveyance, yet future assessments are not affected.

It is our opinion that the purchaser of land conveyed, by virtue of Section 9957a, does not "acquire a title free from any future levy of drainage district taxes on account of unused and unlevied benefits."

III.

Does the drainage district have such an interest in the land as to authorize it to redeem under such law?

As Section 9956a specifically provides that any person having an interest in the land may redeem same, it is our opinion that the drainage district has such an interest that it could protect same by redeeming the property from the holder of the certificate of purchase, by virtue of Section 10766, R. S. Mo. 1929. Section 10766 specifically gives the board of supervisors the right to protect its liens when the property is offered for sale because of delinquent state or county taxes. See, also, Dyer et al. v. Harper et al., 77 S. W. (2d) 106.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

TAXATION: Maximum penalty interest collectible on delinquent personal and real estate taxes.

2.20

February 18, 1936.

FILED
76

Hon. J. K. Robbins
Collector of Revenue
New Madrid County
New Madrid, Missouri

Dear Mr. Robbins:

Your request for an opinion of this office to General McKittrick of recent date has been referred to me for reply. Your request reads as follows:

> "There seems to be some uncertainty as to the proper amount of interest collectors should charge on delinquent taxes.
>
> I am now collecting 12% while another collector is collecting but 10%
>
> An early ruling on this point will be much appreciated."

I presume that you refer in your communication to general delinquent real estate taxes and shall accordingly base the opinion on that premise.

Section 9952, page 429, Laws of Missouri 1933, provides for the interest penalty to be charged on delinquent taxes included in the list of delinquent lands and lots. This section provides for the making up of the list of delinquent lands and lots, for the describing of the same,

> "and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year* * * *provided, however,

> if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this act provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually.
> * * * *"

By this provision it is clear that for a full year the delinquent penalty shall not be more than ten per centum, and if the tax is delinquent for only a portion of a year or a portion of a year in addition to a full year the per cent penalty for that part of the year shall be one per cent per month but not to exceed ten per cent annually. Thus as a practical matter a taxpayer paying delinquent taxes in October should be charged ten per cent penalty for that year and even though the taxes for that year are not paid until November or December the penalty for that year is not to exceed the ten per cent which the taxpayer would have had to pay had he paid his delinquent taxes in October. This is a change from the law as it existed prior to the enactment of Senate Bill 94 in 1933, as prior to the enactment of the law it was permissible for the county collectors to charge up to twelve per cent during the first year for which the tax was delinquent. However, the new law has limited this charge to ten per cent.

In connection with the penalties which may be collected on such delinquent tax we direct your attention to the provisions of Senate Bill 143, page 408, Laws of Missouri 1935, as that law has modified the penalties which are now collectible on delinquent real estate and personal taxes.

CONCLUSION.

It is therefore the opinion of this office that penalty interest on delinquent personal and real estate taxes cannot exceed ten per centum per annum.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

SHERIFFS: Sheriff's mileage fee for taking committed prisoner from one place to another within Clay County.

- -

March 11, 1936.

3-11

FILED
76

Honorable James S. Rooney
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We acknowledge your request for an opinion dated February 28th, which reads as follows:

> "I would be pleased to have an expression of your opinion as to the payment of costs in a criminal case on the following statement of facts:
>
> "A state warrant is issued by a justice of the peace in Excelsior Springs, Clay County, Missouri, and is delivered to the sheriff of the county. The sheriff makes the arrest and brings the defendant before the justice of the peace. He is arraigned, bond set for his appearance, which he fails to make, and the justice issues a commitment to jail. The sheriff then takes this commitment and brings the prisoner to the county jail at Liberty to hold him until the trial day. On the trial day he returns the prisoner to Excelsior Springs for trial. The prisoner is convicted of a misdemeanor and sentenced to serve a term in jail. The justice then issues a commitment to jail and the sheriff returns the prisoner to Liberty. Is the sheriff entitled to his mileage for the round trip on the commitment for trial and his mileage back to Liberty on the commitment to jail?"

If the sheriff of Clay County is entitled to any fee for attending upon a Justice Court or serving process for a Justice Court, there must be a statute authorizing such a fee. See State ex rel. v. Brown, 146 Mo. 401; 47 S. W. 504.

Section 11792 R. S. Mo. 1929, provides:

> "Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

CONCLUSION.

We are of the opinion that under the facts of your letter the sheriff is entitled to mileage as provided in Section 11792, R. S. Mo., supra. Other statutes relating to sheriff's mileage are not applicable to your facts, that is, he is entitled to ten cents for each mile actually traveled under order of a Justice of the Peace.

The two commitments from the Justice of the Peace are the Sheriff's orders to incarcerate and produce the prisoner in Court, and incidentally to incur mileage pursuant to incarceration and production in Court.

Where the Sheriff brings a committed prisoner from jail in Liberty to the Justice Court in Excelsior Springs and back to jail in Liberty to serve a sentence under a new commitment, the distance between jail and the Court is over five miles, and the Sheriff is entitled to ten cents for each mile actually traveled both ways.

If, in Clay County, said County be authorized to hold Court in two places a different fee statute would apply to your facts.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

COUNTY FINANCIAL STATEMENT: It is mandatory on county court to print the annual financial statement
TAXATION: It is duty of county court to pay a newspaper not to exceed $1.00 for each description printed for sales of delinquent lands unless there is a printed contract.

March 20, 1936.

3-20

FILED
76

Mr. Gene B. Roach,
The Carthage Democrat,
Carthage, Missouri.

Dear Sir:

This department is in receipt of your letter of March 9 wherein you request an opinion on the following matter:

> " * * * Does not the state law provide that the annual financial county statement, in each county shall be published; and does it not embrace a fullness of the meaning that it must be a full and complete statement of all items of expenses and all items of receipts?
>
> "Also, does not the law now provide that the county shall pay for the tax sales for delinquent taxes (under the new amended law) at the rate of $1.00 per tract? Our county is holding out on this since last October. I think they know, as do I, full well what the law is and what it means, but we cannot get them to act in settling the bill. * * * * "

In 1935 the General Assembly of the State of Missouri passed Section 12165 (Laws of Mo. 1935, p. 317), the pertinent part of which is as follows:

> "On or before the first Monday in March of each year after the taking effect of this act the county court of each county in this state shall prepare and publish in some newspaper of general circulation published in such county, if such there be, and if not

by notices posted in at least ten places in such county, a detailed financial statement of the county for the year ending December 31, preceding. Said statement shall show the bonded debt of the county, if any, kind of bonds, date of maturity, interest rate, rate of taxation levied for interest and sinking fund and authority for such levy, the total amount of interest and sinking fund that has been collected, interest and sinking fund on hand in cash, list of persons to whom interest and sinking fund has been loaned with the name of each borrower, amount of each loan, interest rate on loan, description of the security for the loan, and amount of interest, if any, delinquent on each loan. Said statement shall also show separately the total amount of the county and township school funds on hand and loaned out, the amount of penalties, fines and forfeitures collected during the year and turned into the permanent school fund, the name of each person who has a loan from the permanent school fund, whether county or township, the amount of the loan, date loan was made and date of maturity, description of the security for the loan, amount if any, of delinquent interest on each loan. Said statement shall show the total valuation of the county for purposes of taxation, the highest rate of taxation the Constitution permits the county court to levy for purposes of county revenue, the rate levied by the county court for the year covered by the statement, division of the rate levied among the several funds and total amount of delinquent taxes for all years as of December 31. The statement shall show receipts into each and every fund separately. First, from the general tax book; second, from railroad tax book; third, from billiard and other table licenses; fourth, ferry licenses; fifth, from land back tax books; sixth,

from personal delinquent lists; seventh, fines and penalties; and eighth, from other sources. The total receipts for the year into all funds shall be shown in the recapitulation. Disbursements shall be shown in detail and each (and)every warrant issued shall be shown separately except as herein expressly provided. Date of warrant, number, person to whom issued and purpose for which issued shall be shown. Under separate heading in each fund the statement shall show what warrants had been paid (or to pay which funds were in the hands of the county treasurer as of December 31) and under a separate heading what warrants were outstanding and unpaid for the lack of funds on that date with appropriate balance or overdraft in each fund as the case may be. Warrants for salaries of persons drawing yearly pay shall be brought into one call in the following form. Warrants No. .....etc. dated.....etc. salary of (name of person, title of office or employment, rate of pay, and total amount of warrant issued). If part are paid and part are unpaid, such paid and unpaid warrants shall be listed separately under proper heading, as heretofore provided. Warrants issued to pay for the service of election judges and clerks of elections shall be in the following form: Warrants Nos. .....to ..... inclusive, pay judges and clerks of elections at $.... per day, listing the names run in and not listing each name by lines, and at the end of the list of names giving the total of the amount of all the warrants issued for such election services. Disbursements by road districts shall show the warrants, if warrants have been issued. Where money has been disbursed by overseers the financial statement shall show the total paid by the overseer to each person for the year, and the purpose of each payment. If the payment was for labor it shall show the number of days each person worked during the year, the rate and the total amount paid to each person during the year. Each road district shall be shown separately and the status of receipts and disbursements

for each district for the year shall be shown. Statements of special road districts shall be included in the county financial statement in the form in which said statements were submitted to and approved by the county court. Receipts into the county distributive school fund shall be listed in detail, disbursements shall be listed and the amount of each such disbursements. If any taxes have been levied by virtue of Section 22 of Article X of the Constitution of Missouri, the financial statement shall contain the following: 'By virtue and authority of the discretionary power conferred upon the county courts of the several counties of this state to levy a tax of not to exceed 25 cents on the $100 assessed valuation the county court of ..... county did for the year covered by this report levy a tax rate of ..... cents on the $100 assessed valuation, which said tax amounted to $..... and was disbursed as follows.' The statement shall show how said money was disbursed and if any part of said sum has not been accounted for in detail under some previous appropriate heading such portion not previously accounted for shall be shown in detail. The recapitulation shall be at the end of the statement and shall be by funds and shall show the condition of each fund at the end of the year as to cash balance or overdraft as between total receipts and total disbursements of every kind including every warrant or other obligation against each fund outstanding at the end of the year. At the end of the statement the person designated by the county court to prepare the financial statement herein required shall append the following certificate: * * * * * "

I

It is duty of County Court to print financial statement under Section 12165, Laws of Mo. 1935 page 317

As the statute states, the County Court shall prepare and publish in some newspaper of general circulation published in the county, we are of the opinion that it is mandatory on the County Court to print the annual financial statement. We are further of the opinion that in setting forth the data which shall be contained in the financial statement, such statement must contain all of the data as set forth in Section 12165, supra.

II

Unless county has a printing contract, county court shall pay a newspaper not to exceed $1.00 for each description of lands sold for delinquent taxes

With reference to the liability of the county for the payment of the delinquent tax lists, you are respectfully referred to Section 9952b, Laws of Mo. 1935, p. 404, wherein it is provided:

> "* * * * The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

It is therefore the opinion of this department that it is the duty of the county court to pay a newspaper not to exceed $1.00 for each description, unless the county has a printing contract, and in that event payment shall be at the rate as contained in the contract.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General

OWN:AH

(Acting) Attorney General

RECORDER: Duty and method of recording "Waiver of Priority Mortgage", not operating as a full release of mortgage.

June 8, 1936.

6-9

FILED
76

Honorable James S. Rooney
Prosecuting Attorney
Clary County
Liberty, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 22, 1936, which reads as follows:

> "I am on today in receipt of a question from our Recorder of Deeds on which I shall be pleased to have an expression of your opinion. I enclose his letter herewith."

We also acknowledge receipt of your enclosure from Mr. Mosby, which reads as follows:

> "I herewith enclose two instruments, one of which is referred to as 'Consent and Recognition of Lease', the other being referred to as "Waiver of Priority of Mortgage.'
>
> "Of course, in both instruments the holder of the mortgage or deed of trust is intending to partially release their security or make the mining lease prior to their mortgage or deed of trust.
>
> "The question is this, should I ask that the note described in the mortgage or deed of trust be produced at the time of filing an instrument of this nature, just as we do in making any partial release in conformity with Section 3081 R.S. Mo. 1929 or would it be permissible to file it for record without the note being produced?
>
> "

> "I am very anxious to have an opinion on this at a very early date, so if you will forward this, along with anything you care to write, to the Attorney General I will certainly appreciate it."

We also acknowledge receipt of copies of papers offered for recording, which are entitled "Consent and Recognition of Lease" and "Waiver of Priority of Mortgage".

Section 3039 R. S. Mo. 1929, provides what instruments in writing are to be recorded by a Recorder and reads:

> "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Section 11543, R. S. Mo. 1929, provides in part:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; * * *"

Section 11547 R. S. Mo. 1929, provides the manner of recording by the Recorder and reads:

> "The Recorder shall record, without delay, every deed, mortgage, conveyance, deed of trust, bond, commission or other writing delivered to him for record, with the acknowledgment, proofs and certificates written on or under the same, with the plats, surveys, schedules and other paper therein referred to, and thereto annexed, in the order of time when the same shall have been delivered for record, by writing them word for word, in a fair hand, noting, at the foot of such record, all interlineations and erasures and words visibly written on erasures, and noting, at the foot of the record, the day and time of the day, month and year, when the instrument so recorded was delivered to him, or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered."

Laws of 1933, p. 196, Sec. 3078, provides in part:

> "If any mortgagee, cestui que trust or assignee, or administrator of the mortgagee, cestui que trust or assignee, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust on the margin of the record thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release; and provided further, that when any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in

case of full deed of release is offered for record, the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; and no full deed of release shall be admitted to record unless the note or notes are so produced and canceled, and that fact entered on the margin of the record and attested as above provided."

CONCLUSION.

We are of the opinion that it is the Recorder's mandatory duty to record the written instruments presented to him, as provided in Section 11547, supra. The facts submitted with your request show that said instruments in question are in writing, properly acknowledged and certified, and that they affect real estate.

The so-called "Waiver of Priority of Mortgage" operates as a partial deed of release, and it is the duty of the Recorder to "note on the margin of the record of the deed of trust the book and page" where the "Waiver of Priority of Mortgage" is recorded. Said Waiver of Priority of Mortgage not being a "full deed of release", the Recorder has no statutory right to demand that notes secured by said mortgage be produced and cancelled as in those cases where "full deed of release" is offered for recording, as prescribed in Laws of 1933, supra.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMANN, Jr.
(Acting) Attorney General.

WOS:H

RESETTLEMENT ADMINISTRATION - Soil Conservation: Linn Co. Soil Conservation Association may incorporate under Secs. 12676-12705 by complying with terms of said statutes and then engage in production and distribution of agricultural lime stone.

September 17, 1936. 9-17

FILED 76

Mr. Phil G. Rohan,
Acting Regional Attorney,
Resettlement Administration,
342 Massachusetts Avenue,
Indianapolis, Indiana.

Dear Sir:

This department is in receipt of your letter of September 5 regarding the Linn County Soil Conservation Association, which is as follows:

> "The Linn County Soil Conservation Association was incorporated by Pro Forma decree of the Circuit Court of Linn County, Missouri, under the provision of Article 10, Chapter 32, of the Revised Statutes of Missouri, 1929 'to engage in any activity in connection with the promotion, fostering, encouragement and facilitation of soil conservation. * * * '
>
> "This Cooperative Association has applied to the Resettlement Administration for a loan which will enable it to engage in the production and distribution of agricultural lime stone, inasmuch as Section 5003 of the Statute, to which reference has been made, provides that associations formed for agricultural purposes cannot be incorporated under this Article. The Association at the present is not validly incorporated. Consequently, to enable them to obtain the requested loan, it will be necessary that they reincorporate.
>
> "We respectfully request your opinion as to whether an association of the type described might be validly incorporated under the provisions of Article 24 of Chapter 87 of the Revised Statutes."

The sections to which you have reference under Chapter 87, Article 24 are 12676 to 12705, inclusive. Section 12677, R.S. Mo. 1929, being pertinent to the question, provides:

> "Eleven (11) or more persons, a majority of whom are residents of this state, engaged in the production of agricultural products, may form a non-profit cooperative association, without capital stock, under the provisions of this article, for the following purpose or purposes: To engage in any activity in connection with the marketing or selling of the agricultural products of its members or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein."

The above statute appears to contemplate that the activities to be carried on by the association are to be non-profitable in nature and to relate to the marketing or selling of agricultural products or other matters relating to the same, or as the statute states "or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies."

Section 12678, R.S. Mo. 1929 enumerates the powers of the association after being incorporated. Subsection (f) is as follows:

> "To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated; or conducive to or expedient for the interest or benefit of the association; to contract accordingly; and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the

> purposes for which the association is organized or to the activities in which it is engaged or any other rights, powers and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of this article."

Although the right to engage in the production of agricultural lime stone is not specifically mentioned, we think the statute, in enumerating the powers of the association, is broad enough to include the same.

The statutes referred to above have not been directly interpreted. However, in the case of Bank of Aurora v. Aurora Cooperative Fruit G. & M. Ass'n., 91 S.W. (2d) 177, these statutes are commented on as follows:

> "Section 12678, subsec. (a), Rev. St. Mo. 1929, Mo. St. Ann. Sec. 12678 (a), p. 509, provides that each association shall have the power to engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, handling, or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring, or use by its members of supplies, machinery, or equipment; or in the financing of any such activities. Subsection (b), Sec. 12678, Rev. St. 1929, Mo. St. Ann. Sec. 12678 (b), p. 509, allows the association to borrow money without limitations as to amount of corporate indebtedness or liability, and to make advance payment to members. Subsection (c), Sec. 12678, Rev. St. 1929, Mo. St. Ann. Sec. 12678 (c), p. 509 allows the association to act as the agent or representative of any member or members in any of the above mentioned activities.
>
> "Undoubtedly, under these sections of the statute, the association had the right to purchase the supplies sold to it by the appellant, and to pledge

the credit of the members of the association for the payment of these supplies, to an extent of the amount due each member and remaining unpaid under his marketing contracts.

"If the association had the right to purchase, on behalf of its membership, the supplies mentioned, then it undoubtedly had the right to pay for these supplies. Under the statute it was given the right to purchase, and therefore the obligation to pay, as a matter of course, must be presumed, subject to the limitation that no member should be liable for more than the sum remaining unpaid on his marketing contracts.

"The statutes and by-laws make the association the agent of the members, and its method of distribution of the crates, boxes and other supplies to its members was a matter solely between it and the membership, as well as its method of collecting therefor. In the purchase of these supplies, we must hold the entire credit of the association, subject to the statutory limitation, was pledged by the association, and that the question of accounting as between itself and its members is solely one as between principal and agent, not affecting the creditor who sold, on the strength of the association's right to purchase the crates and other supplies.

"If the bank had not failed, then the association undoubtedly would have had a right to pay this amount directly from the funds in the bank, and apportion the payment between its members in accordance with its agreement with its membership.

"No distinction as to the liability of a member is made between an association member and an individual. * * * "

The case of Mutual Orange Distributors v. Black, et al, 221 Mo. App. 493, while not bearing on the question directly, shows the similarity of the statutes of the State of Missouri and the State of California, and in interpreting the words "profit" and "pecuniary profit", the Court said (l.c. 494):

> "The evidence shows that plaintiff, Mutual Orange Distributors, is incorporated under the non-profit cooperative corporation laws of California and was organized for the purpose of business without profit. It - - '* * * operates as a definite selling organization that simply at the beginning of each year gets an estimate idea of what the cost of selling is going to be for the year. For instance, thirteen cents per hundred; and if they find in any year the cost of selling is less than that, the difference between the cost and the thirteen cents is rebated to the grower.'
>
> "The stockholders are the growers of fruit and its business is 'to market the crop for the growers at the actual cost.'
>
> "The question, then, to be determined is as to whether plaintiff is organized for pecuniary profit within the meaning of said sections of our statute. Cooperative associations or corporations of the character involved here are of comparatively recent origin. We find upon examination that most of the statutes concerning agricultural or horticultural cooperative associations provide for similar methods of doing business. The statutes of California (see Kerr's Cumulative Supp. Ann. 1906, 1913, to Cyc. Codes of California, p. 972) on the subject, as does our statute (Laws of 1923, p. 111) refer to such corporations as 'non-profit cooperative associations,' and the statutes of the two States are similar to their provisions. The word 'profit' or 'pecuniary profit' has no definite meaning of general application, but are to be

construed in reference to the particular facts and circumstances under which they are used. Our law concerning the formation of non-profit cooperative associations, passed after this suit was instituted, contains a definition of a 'non-profit' association, which being a declaration of the law making body of this state upon the subject, is worthy of consideration. In view of the uncertainty of the meaning of the word 'profit' or 'pecuniary profit', we think that this definition should be followed, in the absence of any other authority on the subject in cases of this kind and in view of the fact that it covers a subject-matter exactly like the one before us. Section 1 of the Act, under the heading of 'Defining terms used in act,' provides - -

'(e) Associations organized hereunder shall be deemed "non-profit," inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.'"

CONCLUSION

We are of the opinion that the Linn County Soil Conservation Association may incorporate under the provisions of Sections 12676 to 12705 inclusive by complying with the terms of said statutes and that it may organize for the objects as mentioned in Section 12677, R.S. Mo. 1929 and then engage in the production and distribution of agricultural lime stone.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

BONDS: Deputy constable forbidden to sign official bond as surety.

11-18

November 11, 1936.

FILED 76

Hon. J. R. Roberts,
Justice of the Peace,
307½ College Street,
Springfield, Missouri.

Dear Sir:

This department wishes to acknowledge your request for an opinion, wherein you state as follows:

> "I am asking you to interpret for me Sec. 2847, Rev. Statutes, relative to who may or may not sign a constable's bond.
>
> "The custom hereto in my jurisdiction is for the constable to have his deputies for bondsmen. I have consulted several good law firms, but they differ widely. I have taken the position that, since a deputy constable can do whatever his principal can do in way of legal process service, he should not do what the principal is forbidden to do in the matter of signing bonds of any kind.
>
> "As a result of such practice it is clear that the constable is placed under obligations to his bondsmen, and is therefore apt to unduly indulge them."

Section 2847, R. S. Mo. 1929, declares what parties shall be taken as surety, thus:

> "No sheriff, collector, constable, county treasurer, attorney at law, clerk of any court of record, judge or justice of any court of record, shall be taken as surety in any official bond that may be given by any officer in this state."

The above section specifically forbids the naming of a constable as surety in any official bond that may be given by any officer in this state. The question presented is whether the prohibition, although not specifically mentioned, includes a deputy constable.

In the case of State v. Missouri Workmen's Compensation Commission, 40 S. W. (2d) 503, l. c. 504, 225 Mo. App. 501, the court lays down the following fundamental rule of statutory construction:

> "The fundamental rule in the construction of the statutes is to ascertain and give effect to the purposes of the Legislature (Consolidated School Dists. v. Hackmann, 302 Mo. 558, 258 S. W. 1011), and a statute must be liberally construed in the light of its underlying reasons, keeping in mind the furtherance of the purpose sought thereby (St. Louis & S. F. R. Co. v. Public Serv. Comm. of State of Missouri, 254 U. S. 535, 41 S. Ct. 192, 65 L. Ed. 389)."

And in the case of Kling v. Kansas City, 61 S. W. (2d) 411, l. c. 413, 227 Mo. App. 1248, the court said:

> "It is not only the duty of courts in interpreting statutes to ascertain, if possible, from all available sources the legislative intent and to give interpretation in accordance therewith, * * *."

In seeking to ascertain the legislative intent, we find, among other things, that a deputy constable must possess the same qualifications and take the same oath of office as a constable.

Section 11754, R. S. Mo. 1929, relating to the appointment of deputies by constables, states:

> "Every constable may appoint deputies who shall possess the same qualifications as the constable, who shall take the same oath of office and for whose conduct he shall be answerable, which appointment and oath shall be filed in the office of the clerk of the county court; said deputy or deputies, so appointed, shall devote his time to the duties of such office, provided, no such deputy or deputies shall be appointed who is or may be directly or indirectly connected with or engaged in the mercantile business, or a member of any firm engaged

> in such business, or a member of or connected with any collection agency, credit house, installment house or loan agency where money or moneys are sought to be collected by suit; and any service of writ, process or execution in any court by such pretended deputy shall be void."

In the case of State v. Pollock, 49 Mo. App. 445, l. c. 446, the court in discussing the powers and duties of a deputy constable as an officer of the county, said:

> "He was in the county in which his township was located, and as such officer he had powers and duties over the entire county."

Bearing in mind that the underlying reason for the enactment of Section 2847, supra, was evidently for the purpose of preventing officers from becoming obligated to each other, and that a duly appointed and qualified deputy constable is a county officer, we are of the opinion that they come within the prohibition of the above section.

We must next determine, however, whether the prohibition as contained in Section 2847, supra, is mandatory or directory. The court in the case of State ex rel. Howell County v. Findley, 101 Mo. 368, l. c. 372, in holding that the above statute was merely directory, and not designed to avoid the bond where the statute has been disregarded, said:

> "The judges of the county court, it is true, ought not to have accepted one of their number as a surety on the official bond of the collector, as the statute forbids them from so doing, but statutes of this sort are regarded as directory merely, and as not designed to avoid the bonds where the statute has been disregarded."

From the foregoing, we are of the opinion that a deputy constable ought not to be named as a surety on the official bond

of a constable as the statute forbids it. However, if same is done, it will not avoid the bond nor release the sureties.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR

PROSECUTING ATTORNEY'S SALARY:)
SALARIES:)
DECLARATORY JUDGMENT ACT)
CONSIDERED:)

Salary and judgment for salary not binding where no notice given to adverse party.

December 16, 1936.

12-21

FILED
76

Judge J. S. Robertson
Presiding Judge
Moniteau County
California, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of December 10, 1936, relative to the claim of the Prosecuting Attorney of Moniteau County for back salary, in which you request the opinion of this Department on the question therein submitted. Your letter is as follows:

"The County Court of Moniteau County, by order of record, must call upon you for advice on the above subject. This due to the fact the Prosecuting Attorney, Mr. Roy L. Kay, has filed a claim for $2750.00 against the County of Moniteau for back salary alleged by him to be due from the county.

"The facts are as follows:

"Auditors from the office of the State Auditor recently filed a report of an audit of Moniteau County for the years 1934 and 1935 wherein it is alleged that the Prosecuting Attorney owes the county between $90 and $100.

"Thereafter the Prosecuting Attorney filed an ex parte proceeding in the Circuit Court for the September Term, 1936, asking the Court to delare that the 1930 census did not take effect until three (3) years thereafter and that he was entitled to

determine the population of the county and collect a salary under the old law (Sec. 11314 R. S. 1929) 'by multiplying the whole number of votes cast at the last preceding presidential election by five' etc. for the years 1931, 1932 and 1933. This proceeding was instituted under the declaratory judgment statute- Laws of 1935, page 218, but no notice was given as required by Sec. 11 of the act. On December 1, 1936, the Circuit Court sustained the action in favor of the Prosecuting Attorney and a judgment has been written.

"In view of Sec. 11 of the Laws of 1935, page 219, the County Court does not deem it is bound by the ex parte proceeding in the Circuit Court of the Prosecuting Attorney but the Prosecuting Attorney insists that the County Court is bound by the same and should pay his demand for the $2750.00 alleged to be due him.

"Enclosed you will find certified copy of the proceedings in the Circuit Court above referred to.

"The records further show that the Prosecuting Attorney drew about $2150.00 for salary in the year 1931, $1100.00 for 1932, and $1100.00 for 1933. $1100.00 appeared the annual salary of Prosecuting Attorney according to the census of 1930 of this Moniteau county.

"Will you therefore kindly advise the Moniteau County Court at your earliest convenience as to the above question."

We find attached to your letter a certified copy of the application of the Prosecuting Attorney of your county for a declaratory judgment and also the opinion of the Circuit Judge on said application under the provisions of the declaratory judgment act, Laws of Missouri, 1935, page 218. We have carefully examined the application and copy of the opinion of the Circuit Judge submitted by you.

We note in your letter that no notice, as required by Section 11 of the declaratory judgment act, was given the county court, and assume also from your letter that the county court did not enter its appearance in this proceeding.

We have examined the declaratory judgment act, but do not think that it contemplates such a situation as was undertaken in the ex parte proceeding mentioned in your letter, in the absence of notice to the adverse party; in this case- Moniteau County. In Section 1 of this act we note that "the Circuit Courts and Courts of Common Pleas of this State, within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." We think that this language was intended to indicate that jurisdiction over parties and subject matter was not intended to be altered and that unless the court had jurisdiction of the subject matter and the parties that any judgment that might be obtained would be ineffective. We do not think that this act departs so far from the fundamental principles that notice need not be given to the adverse party in a proceeding of this kind.

Section 11 of said act says,

> "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. * * *" (Underscoring ours)

In the above we are not unmindful of what is said in Section 5 of said act, which is as follows:

> "The enumeration in Sections 2, 3 and 4 does not limit or restrict the

> exercise of the general powers conferred in Section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

We do not say that the court could not ascertain the salary of the Prosecuting Attorney under this act but we do say that it cannot be done without notice to the county court of your county. It is fundamental that everyone is entitled to his day in court and this applies equally as well to the county or other political subdivision as it does to persons. And by a "'day in court' we mean the time appointed for one whose rights are called judicially in question, or liable to be affected by judicial action, to appear in court and be heard in his own behalf. This phrase, as generally used, means not so much the time appointed for a hearing as the opportunity to present one's claims or rights in a proper forensic hearing before a competent tribunal."

We are not passing on the merits of the Prosecuting Attorney's claim in this matter, but only as to the procedure; for instance, in a suit for back salary certain facts might be brought to the attention of the court and certain conclusions of law might be presented in court that perhaps were not available in an ex parte proceeding like this.

It is, therefore, our opinion that the county court of your county would be justified in refusing to pay, and are not bound to pay, the $2750.00 as set forth in the opinion of the court, on the facts as stated in your letter, where there has been no notice to the county court of the proceeding.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

CRH:EG

KATION: Tax sale under execution to highest bidder--costs to be first paid.

January 31, 1936.

1/4

FILED
77

Honorable W. C. Rose
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Sir:

This office is in receipt of a request for an opinion to be directed to you upon the following propositions:

First, May the County Court receive and accept a sum less than the total taxes, penalties, interest and costs assessed against a tract of land, the payment of which taxes has been enforced by means of a suit instituted prior to the effective date of the Jones-Munger Law?

Second, In the event the proceeds received are insufficient to pay the total tax, penalties, costs and fees how should this be prorated?

Preliminary to the rendering of our opinion on the foregoing questions it should be observed that these questions involve taxes which have been collected pursuant to the provisions of Article IX, Chapter 59, R. S. Missouri 1929, by means of a suit instituted for delinquent real estate taxes prior to July 24, 1933. Although this procedure of collecting taxes by suit was replaced by the procedure provided for in the Jones-Munger Law enacted by the 57th General Assembly, yet the latter enactment provided that in the event suit had been instituted for the collection of delinquent taxes such suit could be proceeded upon to final judgment and execution just as though the provisions of Article IX, Chapter 59 had not been repealed. Section 9962b, page 444, Laws of Missouri 1933. There-

fore, these problems are to be answered in the light of the law as contained in the 1929 revision and not as changed by the law operative in 1933. Probably some confusion has arisen on the problems presented because of the provisions of Section 9953, page 432, Laws of Missouri 1933, which prohibits the sale of property for delinquent taxes if a sum less than the total tax, interest, penalties and costs is bid at the first two sales at which the property is offered. However, this Section applies only to such taxes as are being enforced under the provisions of the Jones-Munger law and has no application to the instant problems.

I.

PROPERTY MAY BE SOLD FOR TAXES AT EXECUTION SALE FOR LESS THAN SUM DUE.

Section 9956 R. S. Missouri 1929 provides for the form of the judgment for delinquent taxes, if against defendant, and also provides:

> "* * *and a special fieri facias shall be issued thereon, which shall be executed as in other cases of special judgment and execution,* * * *".

Section 1202 R. S. Missouri 1929, referring to sales under execution provides:

> "All property taken in execution by any officer shall be exposed to sale on the day for which it is advertised, between the hours of nine in the forenoon and five in the afternoon, publicly, by auction, for ready money, and the highest bidder shall be the purchaser."

It therefore appears that there is no restriction upon sales under execution as to the amount for which the property may be sold when it is sold at execution sale. Certainly there is no specific statutory provision under the old law as is provided for in Section 9953 of the Jones-Munger Act forbidding the sale unless it has been twice offered without a sufficient

bid to pay the taxes, interest and costs. As will be seen from the cases referred to under part two of this opinion the Courts have recognized the fact that no such restriction existed under the old law and have laid down rules for the distribution of proceeds of tax sales under execution when such proceeds were insufficient to pay the full amount of taxes, penalties, interest and costs.

CONCLUSION.

It is therefore the opinion of this office that there is no prohibition against the execution sale of property for delinquent taxes in the event the bid received is insufficient to pay the whole amount of taxes, penalties, interest and costs, although the duty rests upon the Sheriff not to sacrifice the property. Davis vs. McCann, 143 Mo. 172, Shaw vs. Potter 50 Mo. 281.

II.

COSTS, OTHER THAN COLLECTORS COMMISSION AND ATTORNEY FEES, TO BE FIRST PAID FROM PROCEEDS OF SALE AND COLLECTORS AND ATTORNEYS PERCENTAGES TO BE CALCULATED ON BALANCE AND REMAINDER PAID INTO COUNTY TREASURY.

The early case of State ex rel. Kemper vs. Smith, 13 Mo. App. 421, was the first case in which this issue was presented. The leading case in this State on the question is that of State ex rel. Gottlieb vs. Wilson, 174 Mo. 505. The Supreme Court in that case stated at page 509 et seq. as follows:

> "The rule as to ordinary actions is that the parties to the suit are primarily liable for the costs that they directly incur by the institution of the suit, or the defense of it. The very terms of the statute indicate this, and presuppose this primary liability for the costs incurred, for it provides that the prevailing party shall recover his costs.

The only purpose in the provision of the statute in these tax proceedings by the State in which it provides 'that in no case shall the State, county or city be liable for any such costs, nor shall the county court or State Auditor allow any claims for any costs incurred by the provisions of this chapter,' was to bring the State within the exception to the general rule that parties asserting a claim in court are liable for at least the cost that they incur; but it was by no means intended by that provision to adopt a different method to the one universally applied in civil actions; that is, that out of the proceeds of sale under an execution, you first apply the same to the payment of costs; the remainder, if any, is applied to the payment of the debt.

This must not be construed as a suit by the officers to recover costs; it is a proceeding by the State to recover a debt; the cost for the services of the officers is a mere incident to the main proceeding. It would be an unjust rule that this proceeding can be instituted by the State, the officers compelled to perform the services, not of their own seeking, and then for the party asserting the claim to say that there is not enough to pay us all out of the proceeds, but we will divide with you.

While the State, under section 9309, Revised Statutes 1899, is exempted from the primary liability for costs it incurs, yet if proceeds are realized from the assertion of its claim and in the hands of the sheriff, it can not compel the officers, indirectly, to contribute to the part payment of the cost of the proceeding instituted by the State by deducting a part of their fees and applying it to the payment of its claim. If the services are performed by the officers, they are

entitled to full compensation out of the fund realized from such services; and if their fees are to be reduced in order to partly pay the claim of the party instituting the suit, it is in effect making them bear part of the burdens of litigation they had nothing to do in originating. Real Estate being assessed and taxes levied, the statute points out the method of enforcing the lien of the State by appropriate proceedings in the circuit court. The State must know in instituting the proceeding to enforce its lien, that certain costs must accrue, and while it is not liable for any of the costs, it certainly contemplates that its claim and no part of it, can be satisfied out of the fruits of that suit, until the cost it had full knowledge of before instituting the proceeding, has been paid.

* * * * * * * * * *

The only case to which our attention has been called, which determines directly the point involved in this controversy, is State ex rel. Kemper v. Smith, 13 Mo. App. 421. The court speaking on this subject, said: 'The money realized from the sales which took place under this execution should have been applied to the payment of the costs in the cause other than the commissions of the collector and his attorneys. The balance should have been treated as a public revenue out of which the collector should have retained his statutory commission of four per cent and his attorneys their commission of ten per cent allowed by law and by their contract with the collector, approved by the county court, which has been put in evidence. The balance should have gone into the public treasury, to be applied according to law.'

It is insisted by appellant that the rule as announced in that case was a mere dictum, that the question was not involved. It may

> be true that to reach a conclusion upon the controverted proposition in that case, it was not necessary to announce the rule herein quoted. We will say, however, whether involved or not, it announces what seems to be, in our opinion, not only the correct but as well the just and equitable rule in respect to the applicationof the proceeds of the sale of real estate in proceedings of this character. It has be universally followed by all the courts in distributing proceeds realized upon execution, and we find no legal reason for a departure.* * *"

From the foregoing it plainly appears that the court costs incurred in the enforcement of taxes by suit are first charged against the proceeds of the execution sale and must be paid in full. After such expenses have been met, the County Collector is entitled to his percentage upon the balance. This by reason of the provisions of Section 9969 R. S. Missouri 1929 reading:

> "Fees shall be allowed for services rendered under the provisions of this article as follows:
>
> To the collector except in such cities, four percent of all sums collected;
>
> In such cities two percent on all sums collected.* * *"

Thus limiting the county collector to a percentage upon the sums which have been collected as state and county revenue. Likewise, the collector's attorney is also entitled to his percentage upon the balance of the proceeds of the execution sale by virtue of the provisions of Section 9952 R. S. Missouri 1929, which provides in part:

> "* * *For the purpose of collecting such taxes and prosecuting suits for taxes under this article the Collector shall have power, with the approval of the county court,* * * to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed ten per cent of the

> amount of taxes actually collected and paid into the treasury and an additional sum of not to exceed three dollars for each suit instituted for the collection of such taxes, were publication is not necessary, and not to exceed five dollars for each suit were publication is necessary, as may be agreed upon in writing,* * *such sum to be taxed as costs in the suit* * *"

So by the specific statutory authorization for the employment of an attorney his percentage fee may only be calculated upon the amount collected and paid into the treasury. We construe this as meaning ten per cent of the balance of the proceeds of the sale after satisfying the costs of the sheriff, circuit clerk, printer, abstracter and such other costs of suit. The principles laid down in the Wilson case supra have been reaffirmed recently by the Supreme Court of Missouri in the case of Chilton vs. Pemiscot County 330 Mo. 468, 50 S. W. (2d) 645, and by the Springfield Court of Appeals in a case bearing the same title, reported at 228 Mo. App. 4, 63 S. W. (2d)421.

CONCLUSION.

It is therefore the opinion of this office that the proceeds of an execution sale on a judgment for delinquent taxes should be first applied to the payment of the actual costs of suit and that the county collector and the delinquent tax attorney should then receive their percentage fees based upon the balance of such proceeds, and after such percentage fees have been deducted the remaining amount should be paid into the County Treasury.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

BLIND PERSONS: Missouri Commission for the Blind cannot expend money, for removal of physical ailments preparatory to eye operations, from its appropriations.

February 5, 1936.

FILED
7-1

Mrs. Mary E. Ryder
Executive Director
Missouri Commission for the Blind
4342 McPherson Avenue
St. Louis, Missouri

Dear Mrs. Ryder:

This is to acknowledge your letter as follows:

"We endeavor to formulate all programs and policies governing our work according to the statutes creating the Missouri Commission for the Blind. If you will please refer to Section 8889, R. S. Missouri, 1929, Volume 2, Chapter 50, you will find - 'to adopt such measures as the commission may deem expedient for the prevention and cure of blindness.'

"It is that portion of the law from which our department for prevention of blindness emanated. The program of the department is to seek out and examine, hospitalize, operate and treat indigent persons needing care for their eyes; promote the education of isolated semi-seeing children and the organization of sight-saving classes; and conduct an educational and promotional program throughout the state concerning practices, which when applied, prevent blindness - - - to the extent that the appropriation for this purpose will permit.

> "Many of the eye cases coming to our attention have other physical ailments, i. e. diseased teeth, tonsils, venereal disease, tuberculosis, diabetes, etc., which condition is in need of treatment before eye operation is a safe risk.
>
> "Will you please give us your opinion as to whether any part of the appropriation made to the Missouri Commission for the Blind for prevention of blindness could be used for treatment of such ailments as mentioned?
>
> "The prevention of blindness funds have never been used for such purposes, and I am wondering if we went unto the matter of arranging general physical examinations and the treatment of systemic conditions, even though the disease might affect the eye, if it would not be an infringement on the work of the State Board of Health or other health agencies. I shall appreciate your opinion as soon as possible."

Section 8889, R. S. Mo. 1929, provides in part as follows:

> "The duties of said commission shall be * * * * to adopt such measures as the commission may deem expedient for the prevention and cure of blindness. * *"

You desire to know if said part of said section gives the Commission the right to pay moneys appropriated to said Commission for treatment of other ailments which might contribute to blindness.

The Commission for the Blind may only expend moneys appropriated to it according to the terms of the Appropriation Act, and referring to Section 3, Laws of Missouri, 1935, page

45, it is seen that the appropriation for the Missouri Commission for the Blind, Paragraph "D" captioned "Operation," provides in part as follows:

> "General expenses * * * * * hospital expenses incurred for eye operations. * * *"

Nowhere in said appropriation act is it provided that the Commission may expend moneys to operate on a person for other physical ailments, such as diseased teeth, tonsils, venereal disease, tuberculosis, diabetes et cetera, preparatory to an eye operation. In fact, the only moneys the Commission for the Blind can expend out of its appropriation concerns that of expenses incurred for eye operations.

It is probably true that a person with diseased teeth or tonsils would be in a much better condition for an eye operation if such causes were removed. However, in our opinion, the expense of removing such tonsils, infected teeth or other ailments, could not be paid from the present biennial appropriation to the Commission.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

ELECTIONS:)
PRIMARY:) Not necessary to print ballots for Socialist and Socialist-Labor parties in City of St. Louis, where there are no contests; having cast less than 5% at last election for Governor.

June 9, 1936. 6-10

FILED
77

Mr. Alfred L. Rottman
Chief Assistant
Board of Election Commissioners
St. Louis, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of request for an opinion, which letter is as follows:

> "Under authority of Section 10267a (page 67, Election Laws of 1933-1934) this Board printed no Socialist and Socialist-Labor Ballots at the Primary Election held August 7, 1934; these parties having cast less than 5% of the total vote cast for Governor in 1932, and not more than one person having filed as a candidate for any office on such party tickets.
>
> Again, at the coming primary election, there may be no contest for any offices on such party tickets. The situation differs, however, in that party committeemen and committeewomen are to be elected (Sections 10278 and 10278a, pages 66 and 67, Election Laws of 1933-1934) and we are in doubt as to whether or not ballots must be provided. Please give us your opinion in the following instances:
>
> 1 - Should not more than one person file for election as committeeman and and committeewomen, respectively, must ballots be printed for such parties?

2 - Should no persons declare themselves candidates for Committeeman and Committeewoman, the law provides the voter may write in the name of a man and for such offices. Must ballots, therefore be provided?"

In your letter of request you have called our attention to three sections of the statute bearing on the questions asked in your letter, and request our interpretation of same.

Section 10278, R. S. Mo. 1929, provides for the election of a committeeman and committeewoman of the township or voting district at the August Primary in the even-numbered years by writing in in the space left for that purpose on the ballot the names of a man and a woman, qualified electors of the precinct, or voting district, as the case may be, and said section further provides that qualified electors may have their names printed on the ballot for committeeman and committeewoman by complying with the provisions of Section 10257, R. S. Mo. 1929, in other words, may file for committeeman or committeewoman.

Section 10278a, enacted at the 1931 Session of the General Assembly and shown at page 209, Laws of Missouri, 1931, provides for the election at the next August Primary and every four years thereafter in all cities in this State which now have, or which may hereafter have 500,000 inhabitants or more, committeemen and committeewomen. And it further provides that each voter may write in the space left on the ballot for that purpose the names of a man and woman, qualified electors of the ward for committeeman and committeewoman for such ward, and the man and the woman receiving the highest number of votes in such ward shall be the members of the party committee for the city for which such ward is a part and shall hold office for a period of four years from and after the date of such primary and until their successors are duly elected and qualified. Candidates for committeeman and committeewoman, under this section, may file declaration of candidacy the same as other candidates may do for offices by complying with the provisions of Section 10257, supra, and by paying to the treasurer of the party committee of the city of which such ward is a part the sum of $100.00, which shall be evidence of their good faith.

It is therefore seen that in the City of St. Louis, in each presidential year, the committeeman and committeewoman may be selected in the manner therein provided and the man and the woman receiving the highest number of votes in such ward shall be the members of the party committee of the city whether he or she is a write-in candidate or a regularly filed candidate.

The 1933 General Assembly, Laws of Missouri, 1933, page 238, added the following section to Chapter 61, Article 5, R. S. Mo. 1929, known as Section 10267a, which section provides as follows:

> "Whenever any person shall have filed as a candidate for nomination upon a party ticket which, at the last preceding election for Governor, shall have cast less than 5 per cent of the total vote cast for Governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less than 5 per cent of the vote of the state."

Coming now to the questions asked in your letter: First; Should not more than one person file for election as committeeman and committeewoman, respectively, must ballots be printed for such parties?

We assume, of course, that you have reference to the parties, namely, Socialist and Socialist-Labor parties mentioned in your letter. Under the provisions of Section 10267a, supra, a person who shall have filed as a candidate for nomination upon a party ticket which shall at the last preceding election for governor have cast less than five per cent of the total vote cast for governor in such election, and when not more than one person shall have filed as a candidate for any office on

such ticket, no ballot shall be printed for the primary election as herein provided, unless upon a petition of at least ten per cent of the voters voting in the county at said preceding election for governor. Persons filing as candidates under the provisions of this section, having no opposition, are certified as nominees of such party without party tickets being printed for same.

Replying, therefore, to your first question, we are of the opinion that if not more than one man and woman shall file as a candidate for committeeman and committeewoman for the minor party groups aforesaid, one of each to be selected, it will not be necessary to print ballots merely to permit voters to write in names for committeeman and committeewoman respectively, assuming that there are no contests for other offices on said tickets.

And replying to the second question asked in your letter, that where no persons declare themselves candidates for committeeman and committeewoman, coming within the provisions of Section 10267a, supra, where it has not become necessary to print ballots by reason of no contest, we do not deem it necessary to print ballots solely for the purpose of permitting electors belonging to the respective parties aforesaid writing in the names of persons for committeeman and committeewoman in those wards where there are no contests for other offices.

We think it was the intention of the Legislature by Section 10267a, supra, to dispense with the printing of primary ballots for parties casting less than five per cent of the total vote cast for Governor where there are no contests for any offices, and where no one files for committeeman or committeewoman for those parties, likewise there is no contest. It would seem to us to be illogical to cause ballots to be printed merely to permit voters to write in names for committeeman and committeewoman.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

CRH:EG

SALE OF DELINQUENT LANDS: Provisions of Sec. 9952b, Laws of Mo. 1935, p. 403 are mandatory.

October 16, 1936.

10-16

FILED
77

Hon. Donald S. Russell,
County Treasurer,
Nodaway County,
Maryville, Missouri.

Dear Sir:

This department is in receipt of your letter of October 10, wherein you request an opinion, as follows:

> "We have discovered that in the advertisement of real estate for taxes we were one day late to come within the law. Our first insertion was on Monday, October 5, and the following ones would be on October 12 and 19.
>
> "The law states that the last insertion shall be at least fifteen days prior to the date of the sale. The insertion on October 19 will be only fourteen days prior to the date.
>
> "I'm wondering if only one or two properties might be offered on that date and the rest on the following days of that week as the law states that the properties shall be offered from day to day until all have been offered.
>
> "We have a number of small town lots on which the buildings have burned since 1931 and the taxes are so high that I feel certain that no one will pay for those particular properties the amount of taxes against them. In fact, a number of such properties have been offered in the last two years and no bid has been made on them.
>
> "If such a procedure is not advisable, would it be out of order to attempt to have the local paper in which the advertising is being done run a special Sunday Edition on the 19th of October?"

The section referred to in your letter as prescribing the procedure for the publishing of delinquent lands is Section 9952b, Laws of Mo. 1935, p. 403, which provides:

> "The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc. * * * * To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered. * * * * "

The portion of the statute with which we are primarily concerned is: "for three consecutive weeks - one insertion weekly, before such sale - the last insertion to be at least fifteen days prior to the first Monday in November." Has the Legislature in enacting a procedure for the sale of lands for delinquent taxes made such procedure mandatory or directory? If the procedure is directory, then it is possible that the fact that the last notice prior to the sale is 14 days instead of 15 as the statute states, is not fatal to the sale. We shall discuss the statute as to whether or not it is mandatory.

It is a general rule of law that there must be a strict compliance with the statute as it relates to the sale of land for delinquent taxes. 26 R. C. L. Sec. 354, p. 394, says:

> "There is no presumption in favor of the validity of a tax title based upon a sale by a collector as an administrative act. One who claims title to the property of another by virtue of a sale for nonpayment of taxes is bound to show the existence of every fact necessary to give jurisdiction and authority to the officer who made the sale, and a strict compliance by him with all things required by the statute in carrying out the sale. That the variation from the requirements of law was trivial and did the owner no harm is not sufficient reason for disregarding it. The maxim 'De minimis non curat lex' if applicable to tax sales at all should be applied with great caution. * * * * *"

As to defects or irregularities in the sale of land, the same authority, in Sec. 356, p. 397, states:

> "With respect to the proceedings of the collector in selling the property, no distinction is drawn between mandatory and directory requirements of law. Unless the collector acts as the law directs, he acts without authority and the sale is invalid, even if the requirement which he failed to comply with was not imposed for the protection of the owner of the land assessed. * * * * *"

In the case of Thompson v. Roe, 16 U.S. 387, the Court said:

> "The validity of a tax sale depends wholly upon compliance with the statutes authorizing the sale."

Regarding publication of notices, 61 Corpus Juris, Sec. 1594, p. 1181, makes this pertinent statement:

> "The purpose of the advertisement of a tax sale is to warn the owners and to apprise prospective purchasers of the property for sale, and hence statutes requiring notice by publication are regarded as mandatory, and a sale will not be valid unless their provisions are fully or substantially complied with."

As to the time and number of publications, 61 Corpus Juris, Sec. 1597, p. 1185, says:

> "The time prescribed by statute for the notice of sale is essential to its validity, and if the notice is given for anything less than the statutory time, the proceedings are, in most jurisdictions, as fatally defective as if no notice at all had been given; but there is some authority holding that publication for a less period than required will not void the sale. Where the statute requires a publication of the notice for so many weeks 'successively', or once a week for a certain number of weeks, or a certain number of times within a limited number of days or weeks, it must be literally and exactly complied with, at the risk of invalidating the sale, unless the omission of a week is due to a change in the date of publication of a weekly newspaper, in which case publication of the notice in successive issues will suffice."

The rulings in the states of California, Indiana, Kentucky and Maine are to the effect that if the notice be given for less than the statutory time, the same is as fatally defective as if no notice at all had been given.

Referring to the question you raise, to-wit, would it be legal to continue to hold the main sale of the delinquent lands on the 3rd day of November due to the fact that the statute permits the sale to be continued from day to day until completed, we think the case of Sullivan v. Donnell, 90 Mo. 278, while not directly bearing on the same point, has the same principle involved and is decisive of the question. In that case the Court said (l.c. 282-283):

> "The question then comes to this, is this deed still substantially in compliance with the form? By the form it is made to appear affirmatively, first, that the sale when first begun was publicly held, i.e., a public sale; second, that subsequently, and when this property was sold, it was exposed to public sale. Because of the omission of the word 'publicly'in the deed, the second affirmative statement only is made to appear, and, if the first appears at all, it is only by way of inference from the second. It was said in Hopkins v. Scott, 86 Mo. 144, when these same charter provisions were under consideration: 'It is true that other required recitals are made in the deed in the exact language used in the form prescribed, from which an inference can be drawn, that the collector did expose to public sale the property for the payment of taxes, * * * but this does not comply with the requirement of the law, which is that the recital shall be substantially and affirmatively made, and not that one fact, required to be affirmatively and substantially made, may be inferred from other facts recited in the deed, which the statute also requires to be substantially and affirmatively made.' The words contained in this deed, and not in the form, only relate to a continuance of the sale from day to day, and do not in the least aid the omitted recital. Applying, then, the principle upon which the Hopkins v. Scott case was decided, this deed must be held to be worthless, unless we can say it was immaterial whether the sale, when begun, was publicly held or not. This we cannot do. The charter everywhere contemplates and provides for a public sale, from first to last, no matter how long continued,

> and the collector has no power to make any other. If he does not begin the sale on the first Monday of October, under Section 42, he must commence it on the first Monday of November, under Section 52. While the sale may be continued from day to day, he must, at least, begin on that day, the day for which the notice of sale is given, and if not begun then the power to sell becomes functus officio. Prindle v. Campbell, 9 Minn. 212; Wilkins' Heirs v. Huse, 10 Ohio, 139. A sale begun on the first Monday and continued to the tenth, without being public, would be no sale at all within the contemplation of law. The recital that the sale, when begun, was publicly held, is, therefore, material. The fact it recites is material, and the form of the deed also makes it a material recital, and it cannot be supplied by inference from some other recital, which is also made matter of substance by the same form. The recitals in the deed need not be in the exact order in which they appear in the form, nor need they be in the same words. Other words of equivalent import will do, but when the form is departed from it should still leave all that certain which is made certain by the form. There is no hardship in this, for, in looking at the whole deed, it will be seen that the specific recitals relate to those matters occurring at the time of the sale and subsequent thereto, and in the most of which the purchaser, by himself or assignor, is a participant. He may well be required to see to it that he has a deed fair on its face, and especially when he has to but compare it with a statutory form."

The effect of the date of publication upon a local option election is discussed in the case of State ex rel. v. Johnson County Court, 138 Mo. App. 427, to the effect that compliance with the statute as to notice is essential to the validity of the election. Specifically, the Court said:

> "It would be unreasonable to say that a notice has been given when the medium

> of its publication is shut out from the eye of the persons for whom it is intended. To say that, would justify the statement that a verbal notice was given when the thought of the notice was conceived or matured instead of when the words were uttered. The publication of a notice in a newspaper is not the day it is set up in type and printed; it is the day that it may be seen and read in the paper by the public. Not that it must reach every member of the public, but its publication will date from the day when the public begin to receive it from the publisher."

In the case of State ex rel. v. Blair, 245 Mo. l.c. 690, the Court said:

> "The usual rule is that when the law requires a notice to be published for a certain number of weeks or days before legal proceedings are had, it is sufficient if the last insertion of the notice shall occur before such proceedings are had. (German Bank v. Stumpf, 73 Mo. 311; Drainage District v. Campbell, 154 Mo. 159; Harper v. Ely, 56 Ill. 179; Fry v. Bidwell, 74 Ill. 381)."

Under the above quoted decision, we think we are at liberty to say that the converse is true, i.e., if sufficient notice is not given as provided in the statute, it is not a compliance with the law.

Regarding the question of printing the paper one day prior to its usual publication date, we think the decision in the case of State ex rel. v. Johnson County Court, supra, stating "The publication of a notice in a newspaper is not the day it is set up in type and printed; it is the day that it may be seen and read in the paper by the public. Not that it must reach every member of the public, but its publication will date from the day when the public begin to receive it from the publisher," is decisive.

CONCLUSION

In view of the foregoing, it is the opinion of this department that Section 9952b, Laws of Mo. 1935, p. 403 must be strictly complied with in all respects - that the terms of said statute are mandatory, and the fact the statute provides that the insertion of the notice for the sale of delinquent lands must be made fifteen days before the day of the sale, same cannot be complied with by only fourteen days' notice.

We are further of the opinion that no legal sale can be made and no legal title given to said lands due to this irregularity. We are of the opinion that if the sale is adjourned from day to day, the same will not in any wise cure the defect or irregularity in the notice.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COUNTY TREASURER - Cannot claim commission on school funds as provided in Sec. 9266, R.S. 1929 if funds of consolidated school district are paid direct to the treasurer of the district as provided in Sec. 9340, R.S. 1929.

1-22

January 17, 1936.

FILED
78

Honorable Wm. H. Sapp
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

We are in receipt of your letter of sometime ago requesting an opinion from this Department, regarding the facts contained in a letter written by Miss Gladys Pauley, County Treasurer. Her letter is as follows:

> "The tax collections for the town and consolidated school districts have always been sent by the collector directly to the treasurers of the different districts. I have been told that the attorney-general has ruled that this money should be paid to the county treasurer who disburses it to the district treasurers and collects his commission on it as well as on the rural school district disbursements. I understand that this is being done in some counties.
>
> "Will you please investigate and find out if this is true?"

Diligent search of our files do not reveal that we have ever passed on this question. This question has arisen with many county treasurers throughout the State.

By the terms of Section 9266 R. S. Mo. 1929, the county treasurer is made custodian of school moneys, and said section contains compensation for the same, and reads as follows:

> "The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the

different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, in which counties the township trustee shall be the custodian of all school moneys belonging to the township, and be subject to corresponding duties as the county treasurer; and said treasurer shall pay all orders heretofore legally drawn on township clerks, and not paid by such township clerks, out of the proper funds belonging to the various districts; and on hiselection, before entering upon the duties of his office, he shall give a separate bond, with sufficient security, in double the probable amount of school moneys that shall come into his hands, payable to the state of Missouri, to be approved by the county court, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands; and on the forfeiture of such bond it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. if such county clerk shall neglect or refuse to prosecute, then any freeholder may cause prosecution to be instituted. It shall be the duty of the county court in no case to permit the county treasurer to have in his possession, at any one time, an amount of school moneys over one-half the amount of the security available in the bond; and the county treasurer shall be allowed such compensation for his services as the county court may deem advisable, not to exceed one-half of one per cent. of all school moneys disbursed by him, and to be paid out of the county treasury."

By the terms of Section 9340, R. S. Mo. 1929, the county or township collector is directed to pay all school funds belonging to colsolidated school districts to the treasurer of said consolidated school district. Said section reads as follows:

> "The county or township collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled at least once in every month; and upon such payment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of said board of education, and the other shall be filed in his settlement with the county court."

Thus it will be noted by the two sections that there is an apparent conflict. Section 9266 makes a treasurer custodian of all school funds, and section 9340 states that the collector shall pay to the treasurer of the school district. A history of the two sections reveal that section 9266 has been on our Statute books for a long period of time, while section 9340 was enacted by the Legislature many years later. We, therefore, come to the conclusion that 9340 is a special section, while 9266 is a general section. It is, therefore, necessary to apply rules of construction when general and special sections are involved.

In the case of State ex inf. Barrett v. Imhoff, 291 Mo. 603, the court said:

> "Where there are two acts and the provisions of one have special application to a particular subject and the other is general in its terms and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter."

In the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, the court said:

> "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, * * * *. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one;* * * *."

There are numerous decisions to this effect and we will not burden this opinion with further quotations.

CONCLUSION.

In view of the fact that we consider section 9266 R. S. Mo. 1929 to be a general section, and section 9340 R. S. Mo. 1929 to be a special section, making it the duty of the county collector to pay direct to the treasurer of a consolidated district the funds belonging to said district, we are of the opinion that the county treasurer is not entitled to, nor can he claim any commission for the distribution of, or as custodian of school funds as provided in section 9266 R. S. Mo. 1929.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

OWN:H

PENAL INSTITUTIONS: Imprisonment pursuant to the jury's verdict for robbery by means of a deadly weapon is not legally increased under the provisions of section 4428 R. S. Mo. 1929.

January 20, 1936.

1-20

FILED
78

Honorable J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Warden:

We acknowledge your request for an opinion dated January 13, 1936, which is as follows:

> "We have several prisoners serving in the penitentiary who have been convicted of robbery under the provisions of Section 4061, R. S. 1929, commonly known as the Henry Gun Law.
>
> "In several of these cases the Court issued a mittimus committing the prisoners to the penitentiary for the time specified in the verdict of the jury, and have added thereto two years to the time specified in the verdict as provided by Section 4428, R. S. Mo., 1929. All such prisoners have been booked for incarceration to include the two years the Court has added to the time specified by the jury.
>
> "Since the recent decision in State vs. Harris, 87 S. W.(2d) 1026, please advise me whether a prisoner charged and convicted under the Henry Gun Law is properly booked and incarcerated with two years added to the time assessed by the jury.
>
> "And if such prisoners are not now properly booked, what course may we follow in correcting our records?"

The case of State v. Harris, 87 S. W. (2d), 1026, provides as follows:

"The information invokes the punishment prescribed by section 4061, R. S. 1929, Mo. St. Ann. Sec. 4061, p. 2863, which provides that: 'Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than ten years, and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment in the penitentiary for not less than five years.'

"The information, in clear and appropriate language, charges robbery in the first degree by means of a dangerous and deadly weapon. The verdict is responsive to that charge and assesses a punishment within the limits prescribed by said section 4061. The court had no authority to increase the punishment thus assessed unless it is conferred by section 4428, R. S. 1929, Mo. St. Ann. Sec. 4428, p. 3043, which reads: 'If any person shall be convicted of committing a felony, or attempting to commit a felony, while armed with a pistol or any deadly weapon the punishment elsewhere prescribed for said offense in the statutes and laws of the state of Missouri for the felony of which he is convicted shall be increased by the trial judge by imprisonment in the state penitentiary for two years. Upon a second conviction for a felony so committed such period of imprisonment shall be increased by ten years; and upon a third conviction for a felony so committed such period of imprisonment shall be increased by fifteen years. Upon a fourth or subsequent conviction for a felony so committed the person

so convicted shall be imprisoned for life. * * * *

"It appears to us that, as applied or attempted to be applied to robbery in the first degree, committed by means of a dangerous and deadly weapon, section 4428 and 4061 are inconsistent with and repugnant to each other. * * * *

"It is our conclusion that the specific provision of section 4061 as to the punishment for robbery in the first degree committed by means of a dangerous and deadly weapon must be regarded as an exception to, or qualification of, the general provisions of section 4428, and that where, as in this case, the information charges and the jury finds that the offense was so committed, the court or judge thereof is not authorized to increase the punishment assessed by the jury by assessing the additional imprisonment preseribed by sectiom 4428. Defendant should have been sentenced to ten years' imprisonment in accordance with the verdict. * * * *"

Section 3717 R. S. Mo. 1929 provides:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Section 8411 R. S. Mo. 1929 provides:

"It shall be the duty of the board to keep a record book in the office of the penitentiary, in which shall be entered any and all violations of prison rules by convicts, as the same are reported by officer or officers in charge, the record to clearly state the offense, when committed, and what punishment, if any, was inflicted, and stating the name of the officer reporting the same. The board shall deduct from each prisoner's commutation such amount of time as they may deem proper and just, in view of the magnitude of the offense or offenses committed."

Section 8412 R. S. Mo. 1929 provides:

"The board shall at all times receive into the penitentiary on order of the governor, any person convicted of any crime punishable with death, whose sentence may be commuted to imprisonment either for life or for a term of years, in the penitentiary, and shall confine such persons according to the terms of such condition."

Section 8413 R. S. Mo. 1929 provides as follows:

"Whenever any convict shall be delivered to said board, the officer having such convict in charge shall deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

Article V. Section 8, Missouri Constitution provides in part as follows:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all

offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. * * * *."

CONCLUSION.

The warrant of mittimus in the hands of a warden authorizing him to incarcerate a prisoner is nothing more than a certified copy of the judgment and sentence of the Court. It is from this warrant of mittimus that the record clerk determines the duration of imprisonment. It is his duty to see that the records comply with the prison term of the mittimus in specifying the duration of incarceration. Where the prison term of the original mittimus is changed in some manner provided by law, then the record clerk is empowered to change the record accordingly.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN JR.
(Acting) Attorney General.

WOS:H

STATE BARBER BOARD: Payment of $2.00 per year entitles barber to annual license.

March 17, 1936.

FILED
78

3-18

Hon. Henry C. Salveter,
Prosecuting Attorney,
Pettis County,
Sedalia, Missouri.

Dear Mr. Salveter:

This acknowledges receipt of your letter which is as follows:

> "It is my understanding that previous to the act passed by the 1935 session of the Legislature, that a barber who practiced his profession in this State in towns of less than 5000 inhabitants was not required to pay a $2.00 license fee, and that he was out of the jurisdiction of the Barber's State Board of Examiners.
>
> "A barber is in my office, who for the past five years has practiced his trade in a town of less than 5000 inhabitants in this State. The 1935 Session Act of Missouri provides that all barbers over the State must procure a license, the cost of which is $2.00 per year. This barber has tendered the State Board $2.00 for his license of 1936, and has tendered them $2.00 to cover the whole of 1935, although the Statute did not go into effect pertaining to barbers in towns of under 5000 inhabitants until August 27, 1935.
>
> "Even though this barber has sent to the board $4.00 to cover 1936 and 1935, the board nevertheless demands that he send them an extra $2.00. Is your department

> able to advise me why the State Board would refuse, under the above facts, to issue a license for the year 1936? If I have correctly stated the law, and if the above facts are true, and this barber is not required to pay any other or additional fee, and you can advise me by letter immediately, I would appreciate the same, in order that this barber may forward it to the State Board, to clear up the difficulty now existing."

Section 13524, R. S. Mo. 1929, provided for the operative effect of the State Board of Barber Examiners to be limited to cities of 5000 population or more. That section was repealed by the 1935 Legislature (Laws of Missouri, 1935, page 191) and a new section was enacted, under the provisions of which barbers in cities of less than 5000 population are placed under said law.

Section 13522, R. S. Mo. 1929, states:

> "It shall be unlawful for any person to follow the occupation of a barber in this state, unless he shall have first obtained a certificate of registration, or permit, as provided in this chapter: Provided, however, that nothing in this chapter contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided."

Section 13524, Laws of Missouri, 1935, pages 191-192, provides that the barber board

> "shall have the power to administer oaths, and all certificates or permits required to be executed for and on behalf of the board shall be certified over the signatures of the president and secretary."

Section 13523, R. S. Mo. 1929, provides that the board, under certain limitations, may prescribe sanitary rules, and further:

> "A copy of such rules shall be furnished each person to whom a certificate of registration or permit is granted."

Section 13527, R. S. Mo. 1929, provides:

> "Every person now engaged in the occupation of barber in this state shall, within ninety days after the approval of this law, file with the secretary of said board a written statement, setting forth his name, residence and the length of the time during which and the place where he has practiced such occupation, and shall pay to the treasurer of said board two dollars; and a certificate of registration entitling him to practice the said occupation for the fiscal year ending January thirty-first, 1922, thereupon shall be issued to him and the holders of such certificates shall, annually, within thirty days before the expiration of their respective certificate, make application for the renewal of same, stating the number of expiring certificate, and shall in each case pay to the treasurer of said board the sum of two dollars therefor. For any and every license or certificate given or issued by the board a fee of two dollars shall be paid by the person receiving the same."

The last section quoted means that when the barber law first went into effect in 1921, every barber practicing such vocation in cities of five thousand population or over in this state must, within ninety days after the approval of said law, "file with the secretary of said board a written statement, setting forth his name, residence, and the length of the time during which and the place where he has practiced such occupation, and shall pay to the treasurer of said board two dollars"; that by so doing said barber is thereupon entitled to a certificate of registration under said law, and that he is thereby entitled to practice said occupation "for the fiscal year ending January 31, 1922; that such holder of such certificate is required to make application to the barber board for renewal of same annually thereafter, and the application must be made "within thirty days before the expiration" of the year, said application containing certain information as in said section set forth. It also requires the applicant to "pay to the treasurer of said board the sum of two dollars therefor. For any and every license or certificate given or issued by the board a fee of two dollars shall be paid by the person receiving the same."

Said section provides the course to be followed by applicants as they procure authority to pursue their vocation. It provides in the original instance that after the law becomes operative, the applicant shall file with the secretary his application, etc., "and shall pay to the treasurer of said board two dollars; and a certificate of registration entitling him to practice the said occupation for the fiscal year ending January 31, 1922, thereupon shall be issued to him."

The later provision as to the payment of a like sum of two dollars must be reasonably construed. If the Legislature meant by the later provision of the section to require the payment of two dollars by the applicant for merely the application and another two dollars for the license, it does not harmonize with the earlier provision of the section which entitles the applicant to the license or certificate to pursue his occupation by the payment once of two dollars. For this two dollars the applicant procured not only the application, but the license or right to do business as a barber until the end of the year.

In construing statutes all parts thereof should be considered as a whole and reasonably harmonized if it is possible to do so. State ex rel. Dean v. Daues, 14 S. W. (2d) 990. These provisions of this section should be construed together in interpreting the act. State ex inf. Bloebaum v. Broeker, 11 S. W. (2d) 81.

To maintain that the applicant is required by the statute to pay the treasurer two dollars for the mere piece of paper, the printed form of the blank application, is unreasonable, and courts will not adopt an unreasonable construction of statutes. Williams v. St. Louis-San Francisco Ry. Co., 7 S. W. (2d) 392.

The fair and reasonable meaning of the provisions of Section 13527, supra, is that in the first instance when the law became operative, the applicant was required to pay two dollars, and this was all the payment required of him in procuring the right to pursue his vocation as a barber for that year; that if he desired to so pursue his said vocation for the next year or any year thereafter, he was required to pay two dollars, the same accompanying his application, and that when his application was favorably acted on, that this two dollars was all the money he was or is required to pay in order to procure the license. The later provision of the section merely means that in no event can the license be issued on the payment of less than two dollars, regardless of whether the applicant applies and is licensed for the whole year or for a fraction thereof. The section further contemplates that all licenses expire on January 31st of the year.

CONCLUSION

We are of the opinion that the person whose acts you set forth in your inquiry and who has tendered the State Board of Barber Examiners two dollars in payment of his 1935 license, and has tendered said board two dollars for his 1936 license, if otherwise qualified, has tendered to said board all the money the law requires him to pay said board in order to be entitled to his license as a barber entitling him to pursue the vocation of a barber in this state.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

ELECTIONS: Party cannot become an independent candidate for Sheriff without complying with Section 10241, R.S. 1929.

8-14

August 13, 1936.

FILED
78

Honorable Henry C. Salveter,
Prosecuting Attorney,
Pettis County,
Sedalia, Mo.

Dear Sir:

This department is in receipt of your letter of August 11 wherein you make the following inquiry:

> "Will you please advise me if after the Primary Election held on August 4, 1936, a man can still run as an independent candidate for Sheriff in Pettis County, and if he can, what steps are necessary for him to take, in order for him to have his name printed on the official ballot for the November election?
>
> "Would it make any difference if the man who now desires to run as an independent candidate was a candidate to secure the nomination for this office on one of the Primary tickets at the recent Primary election?
>
> * * * *
>
> "There were no independent candidates for any county office in Pettis County at the last primary election, held August 4, 1936.
>
> "This candidate contends that he has the right to run as an independent candidate for Sheriff and he has filed a declaration with the County Clerk of this county and paid to the County Clerk a filing fee of $5.00, and has received a receipt from the County Clerk for the same."

Any person desiring to be a candidate on an independent ticket, or the nominee of an Independent Party in the primary, is required to comply with the provisions of Section 10259, R.S. Mo. 1929, which is in part as follows:

> "Any person desiring to file declaration papers, or propose as a candidate on any independent or nonpartisan ticket, who does not announce by declaration papers as a candidate for any political party as defined by this article, and is not a member of a political party having a state and county committee, or treasurer thereof, shall pay the sum of money required by this article to be paid by the candidate for the office for which he proposes to the state or county treasurer, as the case may be;"

In 1933, the Legislature passed Section 10267a (Laws of Mo. 1933, p. 238) which provides:

> "Whenever any person shall have filed as a candidate for nomination upon a party ticket which, at the last preceding election for Governor, shall have cast less than 5 per cent of the total vote cast for Governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less than 5 per cent of the vote of the state."

Neither of the above sections have any direct bearing on the question except that it was the intention of the Legislature that persons desiring to become party nominees in the general election, in order to have their names printed on the ballot, must comply with the terms of the statute. We note that your letter states the candidate in question was a contestant in the recent primary election and was defeated on one of the party tickets--we assume either Republican or Democratic; hence, it is plain that he did not attempt in the primary to qualify as an Independent candidate.

The only other section that bears on the question, and which we believe governs the situation is Section 10241, R.S. Mo. 1929, which is as follows:

> "The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent. of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made; provided, that said signers shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

The candidate in question could not qualify by merely filing his declaration of candidacy or by paying to the County Clerk the filing fee of $5.00.

In construing this section, the Supreme Court of Missouri, in the case of State exrel. Preiss v. Seibel, 295 Mo. l.c. 624, said:

> "Section 4811 provides for the nomination of candidates for public offices otherwise than by a primary election. If electors resident within a district or political division of the State, to a number equal to one per cent of the entire vote cast at the

> last preceding election in the State, county or other political division, desire to nominate one or more candidates for public offices, to be filled by election, the right to nominate them and have their names printed on the ballots is guaranteed in the manner prescribed by this section of the statutes. The candidates so nominated may be those already nominated by one or more of the political parties, so that under this section electors may nominate candidates of the various political parties and have their names printed on the ballots. This authorizes electors to act independently of all political parties. In other words, a ticket so nominated would be a non-partisan or non-political ticket. The only restriction upon such nomination is that the electors signing a certificate of nomination must declare in the certificate that they are bona fide supporters of the candidate sought to be nominated, and have not aided and will not aid in the nomination of any other candidate for the same office."

Under Section 10299, R.S. Mo. 1929, it is the duty of the County Clerk to furnish the ballots. Said section is as follows:

> "Except as in this article otherwise provided, it shall be the duty of the clerk of the county court of each county to provide printed ballots for every election for public officers in which the electors or any of the electors within his county participate, and to cause to be printed in the appropriate ballot the name of every candidate whose name has been certified to or filed with him in the manner provided for in this article. Ballots other than those printed by the respective clerks of the county courts according to the provisions of this article shall not be cast or counted in any election."

Thus, it will be noted that only candidates whose names have been certified and filed with the County Clerk in the manner provided for in Article VI, R.S. 1929 are to be printed on the ballots.

The party in question is privileged to run independently as any other citizen in the State of Missouri, if he is qualified, by the name of the regular party nominee being scratched and his name written in instead, and if he should receive more votes than either of the party nominees, he would be legally elected to the office of Sheriff. This has been the law in this state since the case of State ex rel. Hostetter, 137 Mo. l.c. 645, wherein the Court said:

> "But even if we should concede that the vacancy caused by the death of Mr. Wheeler happened too late to permit of placing a formal printed nomination on the ballot, under the present ballot law, the people would nevertheless have the right to express their choice by writing on the ballot the name of any qualified person whom they desired to designate for any office which the law (section 1964) permitted to be then filled by election. The electors are not restricted to the names or offices printed on the official ballot. (People ex rel. v. Shaw, 133 N.Y. 493; People ex rel. v. President, 144 N.Y. 616; Sanner v. Patton, 155 Ill. 553; Cole v. Tucker, 164 Mass. 486.)
>
> "This statute does not prevent the free exercise of suffrage. The voter is left free to vote for whom he pleases. Nor does the statute permit any power, 'civil or military', to interfere 'to prevent the free exercise of the right of suffrage.' Under this statute, when the voter goes to the quietude of his booth to vote he has the absolute and unqualified right to vote for whom he pleases."

CONCLUSION

It is the opinion of this department that the candidate for sheriff in the instant case cannot have his name printed on the official ballot unless he complies with Section 10241, R.S. Mo. 1929. We do not think the County Clerk has any authority to accept the $5.00 filing fee and place his name on the ballot as an independent candidate.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

ELECTIONS: Interpretation of Section 10241, Revised Statutes Missouri 1929

August 26, 1936

8-26

FILED
78

Honorable Henry C. Salveter
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This department is in receipt of your letter of August 20, requesting an interpretation of Section 10241, Revised Statutes Missouri 1929, as it refers to a candidate for the office of sheriff, on the following two questions:

1 Who is competent to sign a certificate of nomination under this section, and

2 To what election do the words of this statute, "at the last preceding election", refer.

Section 10241, Revised Statutes Missouri 1929, provides:

> "The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent. of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made; provided that said signers shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

In the case of State ex rel. Preiss v. Seibel 295 Mo. 607, l. c. 624, the Supreme Court said:

> "Section 4811 provides for the nomination of candidates for public offices otherwise than by a primary election. If electors resident within a district or political division of the State, to a number equal to one per cent of the entire vote cast at the last preceding election in the State, county or other political division, desire to nominate one or more candidates for public offices, to be filled by election,the right to nominate them and have their names printed on the ballots is guaranteed in the manner prescribed by this section of the statutes. The candidates so nominated may be those already nominated by one of more of the political parties, so that under this section electors may nominate candidates of the various political parties and have their names printed on the ballots. This authorizes electors to act independently of all political parties. In other words, a ticket so nominated would be a non-partisan or non-political ticket. The only restriction upon such nomination is that the electors signing a certificate of nomination must declare in the certificate that they are bona-fide supporters of the candidate sought to be nominated, and have not aided and will not aid in the nomination of any other candidate for the same office."

In view of the foregoing, it is the opinion of this department that only those electors are qualified to sign the certificate of nomination who have not aided and do not intend to aid in the nomination of any other candidate for the same office. In other words, if an elector voted for some other candidate for sheriff in the primary election he

is not qualified to sign the certificate of nomination.

We are further of the opinion that the words of the statute,"at the last preceding election," refer, in this instance, to the last preceding election for the office of Sheriff of Pettis County.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JWH:LC

OFFICERS--SOLDIERS: The personal and real property of members of the R. O. T. C. is subject to taxation in this State.

September 17, 1936

9-17

FILED
78

Honorable William H. Sapp
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

We acknowledge receipt of your letter of September 9, 1936, and the enclosed letter from the State Auditor. Your request reads as follows:

> "The letter herewith enclosed is self-explanatory. It seems that the city assessor, who is also deputy county assessor, wishes to know whether or not he should assess the personal property belonging to members of the R. O. T. C. "

Article X, Section 6, Missouri Constitution provides:

> "The property, real and personal of the State, counties and other municipal corporations and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Article X, Section 7, Missouri Constitution provides:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

Section 9742 R. S. Mo. 1929, provides:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9743 R. S. Mo. 1929 provides in part:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; * * *."

Section 9743, supra, is silent as to exempting the personal property of members of the R. O. T. C. Exemption of United States soldiers and United States property does not exempt the personal property of the soldier. At best it could only exempt the soldier from a poll tax. In an opinion rendered by this department, July 7, 1933, to State Auditor Forrest Smith, we held that even where the Legislature exempts property leased by the State for military purposes, such an act of the Legislature is unconstitutional because it purports to make statutory exemptions not permitted in the Constitution.

In State ex rel. Union Electric Light and Power Company v. Baker, 293 S. W. 399; 316 Mo. 853, l. c.858, the Supreme Court said:

> "It is the well settled policy of our law that taxes shall be levied and collected for public purposes on all property within the territorial jurisdiction of the State, except that expressly enumerated as exempt."

In the City of Kansas v. The Kansas City Medical College, 20 S. W. 35; 111 Mo. 141, the Supreme Court held that the constitutional exemption to a medical college building did not extend to personal property used in the building and devoted to school purposes.

Section 9756 R. S. Mo. 1929, provides in part:

> "The assessor or his deputy or deputies shall between the first day of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, * * * *."

Section 9745 R. S. Mo. 1929, provides:

> "All personal property of whatever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 9763; and all notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides; and the owner, in listing, shall specifically state in what county, state or territory it is situate or held.

CONCLUSION.

The assessors duty is to assess all personal property in the State. Of course he is to assess only taxable property. The Constitution enumerates the property exempt from taxation. The Supreme Court has

held consistently that the Legislature cannot exempt property not exempted by the Constitution. Since the Legislature suffers this limitation, it follows that the assessor is also guided in his duties by constitutional exemptions, and all legislative exemptions which be constitutional.

It is true that United States property, pursuant to the Constitution and Statutes, is not subject to taxation in this State. It does not follow from this exemption that the property of a soldier is thus exempted. Federal property and individual property are not confused because an individual becomes a soldier. The soldier's property, in his possession, care and custody, which is supplied by the Federal Government remains the property of the Federal Government and is not subject to taxation in this State. The soldier's property which the Federal Government gives to him outright, or which he accumulates by his initiative belong to him individually.

The cases in this State hold that before any exemption from a tax on property can be asserted with legal sanction, said exemption must be specifically enumerated in the Constitution and Statutes, and where enumerated in the Statutes the exemption must follow the Constitution.

We find no constitutional or statutory provision expressly authorizing an exemption of taxation on either real or personal property belonging to members of the Reserve Officers Training Corp. There is no more reason for such an exemption than for the exemption of the personal property of a medical school used exclusively for school purposes.

This department is of the opinion that the assessor's duty is to assess all property in the State including the personal and real property belonging to member of the Reserve Officers Training Corp.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS
Assistant Attorney General.

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

PUBLIC OFFICERS: County Surveyor cannot hold office of County Administrator of W. P. A.

2-29

January 22, 1936.

FILED 79

Hon. Louis Schneider,
Presiding Judge of County Court,
Vernon County,
Horton, Missouri.

Dear Sir:

This department is in receipt of your letter of January 10 wherein you request an opinion on the following matter:

> "On December 30, 1935, I wrote you requesting an opinion as to whether a County Surveyor-elect can legally hold a Federal remunerative appointment.
>
> "The County Surveyor of Vernon County has accepted an appointment as County Administrator of the WPA, 4th District, State of Missouri.
>
> "We believe that this man cannot lawfully hold this Federal and elective county office at the same time.
>
> "However, before taking any action, we will appreciate the opinion from the Attorney General regarding the same."

On May 22, 1935, this department rendered an opinion to the Honorable Joseph M. Bone, Prosecuting Attorney of Audrain County, Mexico, Mo., wherein the question of a person holding the office of Public Administrator of the county and Assistant Postmaster was discussed, a copy of which opinion

is herewith enclosed. You will note that it was the conclusion of this department that the holding of the two offices was violative of Section 4, Article XIV of the Constitution of Missouri, and several decisions are cited in support thereof. The reason, logic and law as applied in the enclosed opinion should be applicable to the case now under consideration; however, the County Surveyor is a public officer, duly elected as other county officers.

We call your attention to the fact that the County Surveyor of your county, in being appointed County Administrator of the Works Progress Administration, is evidently receiving his appointment by virtue of Section 401, Chapter 8, U.S.C.A., entitled "Public Buildings, Property, and Works", which is in part as follows:

> "(a) To effectuate the purposes of this chapter, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the 'Administrator'), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to chapter 13 of Title 5, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this chapter to such officers, agents and employees as he may designate or appoint."

The above section does not undertake to accept and utilize such state and local officers and employees where employment of the same would be contrary to a statute or constitutional provision of the state. It expressly provides that consent to accept same must first be obtained from the state, and in view of Section 4, Article XIV, of the Constitution, supra, such consent would be impossible.

We are, therefore, of the opinion that it is violative of Section 4, Article XIV, of the Constitution of Missouri for a person to hold the office of County Surveyor and the office of County Administrator of the Works Progress Administration.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SALES TAX: Sales made by stationery store of St. Louis University not subject to taxation.

9/18

September 17, 1936.

FILED
74

Rev. Alphonse M. Schwitalla, S.J.,
Dean St. Louis University School of Medicine,
1402 South Grand Boulevard,
St. Louis, Missouri.

Dear Father Schwitalla:

This department is in receipt of your letter of September 15 requesting an opinion as to whether sales made by the stationery store conducted by St. Louis University are subject to the sales tax. In this connection, we have at hand correspondence between you and your attorney and the State Auditor wherein it was determined by the State Auditor that these sales were subject to the Act.

We further note in your letter of October 18, 1935 to Mr. G.H. Bates, Sales Tax Supervisor, that these stores are owned by the University and organized on a non-profit plan. Assuming these facts to be true, it is our conclusion that sales made by the stationery store are not subject to the sales tax for the following reasons:

Section 1, subsection (c), Laws of Missouri 1935, p. 413, provides:

> "'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect and the classification of which business is of such character as to be subject to the terms of this Act. The isolated or occasional sale of tangible personal property, service, substance or thing, by a person not engaged in such business does not constitute engaging in business, within the meaning of this act."

It is clear from this definition of the term "business" that a store organized and operated on a non-profit basis for the benefit of students would not be within the intent or contemplation of this section of the Act. It was obviously the intention of the Legislature to subject to taxation only those sales made with the object of gain, benefit or advantage, and sales not so made cannot be construed to be within the meaning or the intent of the Act.

However, there is, in our opinion, a further reason why these sales are exempt from taxation under this Act. Section 45 Laws of Missouri 1935, p. 426, provides:

> "In addition to the exemptions under Section 3 of this Act there shall also be exempted from the provisions of this Act all sales made by religious, charitable and/or Eleemosynary Institutions, in the conduct of the regular religious, charitable and/or Eleemosynary functions and activities."

In the case of Jackson v. Phillips, 14 Allen (Mass.) 539, the Court said:

> "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

Judge Van Valkenburgh, in the case of Gossett v. Swinney, 53 F. (2d) 773, said with reference to the above citation:

> "Many more definitions and citations of the same general character might be added, but the foregoing would seem to be sufficient to establish the general, as well as the specific, holding and policy of Missouri."

While these definitions of the word "charity" tend to substantiate the modern conception that activities of an educational nature are necessarily charitable in character, perhaps the case best illustrative of this proposition is the case of Trustees of Washburn College v. O'Hara, 90 P. 234, wherein it is said:

> "The advantages, direct and indirect, which the highly educated citizen imparts to the general public cannot be estimated. Every advancement made in the scientific, mechanical, moral, literary or other pursuits of life adds to the general sum of human knowledge, comfort and happiness. As higher education increases, civilization advances. The elevating and beneficient influences which the general public receives from educational sources make every citizen a beneficiary thereof and furnish complete justification for placing every educational trust not strictly private and having increased learning for its object in the category of public charities."

CONCLUSION

In view of the fact that the stationery store in question is operated on a non-profit basis for the benefit of students of St. Louis University, and in view of the further fact that it is intimately connected with and a part of the activities of St. Louis University, it is our opinion that by reason of Section 1, subsection (c) and Section 45, Laws of Missouri 1935, p. 413, sales made by this store are exempt from the provisions of this Act.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

MORTGAGES AND DEEDS OF TRUST: If securing a series of over $100,000, may be released without production of notes under Section 3083, Laws. Mo. 1933, p. 194.

May 11, 1936.

5-12

FILED
81

Hon. Oliver Senti,
Associate City Counselor,
City Hall,
St. Louis, Missouri.

Dear Sir:

This acknowledges receipt of your letter which is as follows:

> "We have an inquiry from the Recorder of Deeds as to whether he can release a deed of trust without the production of the notes, under the circumstances set out in the enclosed letter from Mr. Emmett Carter of Carter and Jones.
>
> "Will you please advise the City Counselor if, in your opinion, it is the duty of the Recorder of Deeds to comply with Mr. Carter's request and enter the full release of the deed of trust without the notes being produced?"

Attached to the same is a letter from Mr. Emmet T. Carter of Carter & Jones setting out the facts, which we understand to be as follows:

The Leader Building Company is a corporation and it executed a deed of trust on real estate located in Missouri whereby a series of notes aggregating $2,500,000 is secured. The deed of trust aforesaid expressly provides that the trustee, the Mercantile-Commerce Bank and Trust Company, shall, upon demand of the mortgagor, execute such deeds or instruments as may be necessary to vest the property covered by the deed of trust in the mortgagor, and further provides that the trustee therein may enter satisfaction of the indenture upon the records without production of the notes or coupons so

secured by said deed of trust, and provides that the president or vice-president of the mortgagor shall make and file with the Recorder affidavits stating that all the notes so secured have been paid or that sufficient funds have been deposited with the trustee to pay all the notes outstanding and unpaid, and that said money is deposited for the express purpose of paying said notes when the same shall be presented for payment to the said trustee. Said deed of trust further authorizes the mortgagor to make prepayment of the said notes.

A deed of release has been executed by the mortgagee or beneficiary which complies with all the requirements of the deed of trust and follows the course as authorized by said deed of trust as above set forth, and attached to said release deed are affidavits stating that all of the notes so secured have either been paid or that the money necessary to pay them in full has been deposited with the trustee for the express purpose of paying the said notes in full when the same shall be presented to the trustee for payment.

Section 3083, R. S. Mo. 1929, was repealed in 1933 and a new Section 3083 was enacted (Laws of Missouri, 1933, page 194), the pertinent parts of which latter statute are as follows:

> "Whenever any mortgage or deed of trust heretofore or hereafter executed, providing for the issue of a series of notes or bonds aggregating one hundred thousand dollars or more not including interest or interest notes or coupons secured in whole or in part by property located in this state, by its terms confers authority upon the trustee or trustees therein named, or either of them, to release the property or any part thereof encumbered by any such mortgage or deed of trust from the lien thereof, such release may be so made and it shall be the duty of the recorder of deeds of the county in which the property is released from such mortgage or deed of trust shall be situated to accept and record in the proper records any deed of release executed and duly acknowledged by such trustee, pursuant to the authority conferred by such mortgage or deed of trust, releasing the whole or any part of such mortgaged property, without the notes or

> bonds or coupons secured by such mortgage or deed of trust being produced: Provided, however, that no such release shall be made unless such mortgage or deed of trust shall contain a provision requiring that the amount due under the mortgage or deed of trust or the amount of money or other consideration received from the sale of the property described in such release or such portion thereof as may be stipulated in such mortgage or deed of trust shall be deposited with some banking firm or banking corporation or trust company named in such mortgage or deed of trust for the benefit of the holders of such notes or bonds."

Doubtless the reason for your inquiry is because Section 3078, Laws of 1933, page 196, provides that the notes secured by a deed of trust on realty shall be produced and cancelled or that affidavits be made and attached as therein specified, in order to release such deed of trust, and if this latter section is to be given its literal effect, it would seem to be inconsistent with the provisions of Section 3083, supra, but Section 3078 is a general law and must yield to the provisions of Section 3083 as to the class of securities mentioned in the latter section.

The purpose of the Legislature is apparent to be that the provisions of Section 3078, supra, shall apply and govern the release of all deeds of trust except the class defined by Section 3083, but shall not apply as to such latter class. By this construction effect is given to both sections, and if Section 3078 were interpreted as governing the release of all deeds of trust, then Section 3083 would be devoid of meaning.

In interpreting statutes the courts construe them so that each act passed shall have effect if the same can reasonably be done. Different sections of a statute under construction bearing on the same subject matter must be harmonized if possible.

In the case of State v. Freeland, 300 S. W. 675, l. c. 677, the court says:

> "When different sections of the statute bear on a subject, it is a rule of construction that such sections must be harmonized if possible."

And apparently conflicting provisions of a statute must be reconciled if possible with the general legislative purpose.

In the case of Dysart v. City of St. Louis, 11 S. W. (2d) 1045, l. c. 1050, the court says:

> "It is the duty of the court in construing statutes which appear to be in conflict to reconcile them if possible with the general legislative purpose."

CONCLUSION

In the light of the above, it is our opinion that Section 3083 governs as to the release of deeds of trust of the class of securities mentioned therein, and as to such classification of securities Section 3078 does not apply, and that under the facts set forth above as the basis of this opinion, the deed of trust being considered is within the classification covered by Section 3083, and that it is the duty of the Recorder of Deeds of the county in which the property securing said debt is located to accept and record in the proper records the deed of release which has been executed and duly acknowledged by said trustee pursuant to the authority conferred by said mortgage or deed of trust, and that the same should be done without the production before him or cancellation by him of the notes or bonds or coupons secured by such mortgage or deed of trust.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

RECORDER: In cities of 600,000 inhabitants or more, and in adjoining counties, the recorder shall identify and stamp notes or bonds secured if lien is intended to be created on real estate.

7-24

July 24, 1936.

FILED
81

Honorable Oliver Senti,
Associate City Counselor,
St. Louis, Missouri.

Dear Sir:

We acknowledge your request of July 21st, which is as follows:

> "Enclosed is a letter from Buder & Buder in reference to a supplemental indenture, extending the time of payment and reducing the rate of interest (pursuant to a Federal decree in a proceeding under Section 77 of the Bankruptcy Act) on bonds secured by a mortgage (the original indenture), which has been submitted to the Recorder of Deeds for recording without presenting for identification, in accordance with Section 3096-B, Laws of Missouri 1933, page 192, new bonds, which, under the decree, are to be distributed to holders of and in exchange for the bonds secured by the original indenture.
>
> "It is the contention of the Recorder of Deeds that while the lien is created by the original indenture and not by the supplemental indenture, the purpose of Section 3096-B is to identify the evidences of debt secured by the mortgage or original indenture, and since the new bonds are to be substituted for the original ones, they thereby become the holders' only evidence of the debt secured by the original indenture, and that unless the new bonds are identified

in the manner prescribed by the statute, its purpose is defeated.

"Since the question involves the construction of a State law, the Recorder should be guided by your interpretation of its terms, and I respectfully request that you advise the City Counselor whether, in your opinion, the Recorder of Deeds can lawfully require the production of the new bonds for certification before recording the supplemental indenture, so that we can advise him accordingly.

"Mr. W. W. Crowdus, of Buder & Buder, will be in Jefferson City on Wednesday, and would like to submit his views concerning the matter for your consideration."

Section 3096b, as found in the Laws of Missouri, 1933, page 191, in part, is as follows:

"In all cities in this State which now have, or which may hereafter have 600,000 inhabitants or more, and in counties adjacent to such cities, when any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing, shall be filed for record, the instrument or instruments representing the principal of such debt or obligation or any part thereof shall be presented to the recorder of deeds at the time of such filing for record, or in case said mortgage or deed of trust or other instrument is to be filed in more than one county then to the recorder of the county where first filed, and the recorder shall, for the compensation of ten cents for each of the first four (4) of such instruments identified by him and two cents for each additional instrument identified by him, stamp or write upon each such instrument evidencing principal so secured an identification thereof as being a note, bond or

> other evidence of debt described by such mortgage, deed of trust or other instrument of security."

We assume the property referred to is in the City of St. Louis, which has a population of more than 600,000 inhabitants, and therefore said section applies.

It will be noted that said section applies to transactions where it is "intended to create a lien upon real estate."

The Supplemental Indenture under consideration here is the instrument bearing date of April 15, 1936, between United Post Offices Corporation, a Delaware corporation, and Chicago-Edgewater Postal Building Corporation, an Illinois corporation, and Chicago Lawn Postal Building Corporation, an Illinois corporation, and Chicago-Cragin Postal Building Corporation, an Illinois corporation, first parties, and Irving Trust Company, a New York corporation, and Robert N. Hawes of St. Louis, Missouri, as trustees, second parties, and Raymond D. Brown of Indianapolis, party of the third part.

Section 1 of Article IV of said Supplemental Indenture provides, among other things, the following:

> "The Company and the Associated Companies hereby ratify and confirm the prior mortgage, conveyance and assignment to the Trustees of all property mentioned or described in the Original Mortgage or the supplements thereto, and do hereby further assure that said property is and has been mortgaged, pledged, granted, bargained, sold, aliened, released, remised, conveyed, transferred, assigned, and warranted unto the Trustees, their successors and assigns, to have and to hold for the purposes and upon the trusts provided and set forth in the Original Mortgage, as modified, amended, and altered by this Supplemental Indenture, said property (exclusive of leases the terms of which have expired prior to the date of this Supplemental Indenture) being more fully described as follows: * * *"

We observe that on page 22½ of said Supplemental Indenture is the following provision under Subdivision B of Section 3:

> "All other property of whatsoever kind or description, whether real or personal, now owned or which may at any time hereafter be acquired by the Company or the Associated Companies, and whether or not expressly conveyed, mortgaged or pledged under the Indenture, except such stocks of merchandise and other personal property as shall now or hereafter be owned, held or acquired for sale in the ordinary course of business, and except all cash, bills, notes, and accounts receivable, owned or held by the Company or the Associated Companies. All such other property not excluded as aforesaid from the lien hereof shall, as herein provided and by indenture or indentures supplemental hereto, be expressly conveyed, mortgaged or pledged and delivered to the Trustees by the Company or with its consent by anyone on its behalf, provided, however, that the failure of the Company to execute and deliver such supplemental indenture or indentures, or to deliver any of said property to the Trustees, shall not affect the lien hereof thereon."

By this latter provision the Supplemental Indenture conveys not only the property which is now covered by the primary mortgage, and which primary mortgage this mortgage is supplemental to, but it provides that all after-acquired property is subject to the terms of this mortgage. By this provision an equitable lien is created upon the after-acquired property of the company.

In the case of Clayton v. Gentle, et al., 14 S. W. (2d) 672, the court says:

> "No mortgage on after-acquired property conveys title to such property. All it does do is to convey an equitable lien, which attaches when the property is acquired. Wright v. Bircher, 72 Mo. 179, 37 Am. Rep. 433; Rutherford v. Stewart, 79 Mo. 216; (Mo. App.) Langford v. Fanning (J. I. Case Threshing Machine Co., Intervener), 7 S. W. (2d) 726, 728."

37 C. J., page 315, Par. 19, states the following:

> "As a general rule any express executory contract in writing, based upon a valuable and adequate consideration, whereby one party clearly indicates an intention to charge or appropriate some particular property, real or personal, therein described or identified, as security for a debt or other obligation, or whereby one party promises to assign, convey, or transfer the property as security for such a debt or obligation, creates an equitable lien upon the property so indicated which is enforceable against the property in the hands, not only of the original contractor, but also of his heirs, personal representatives, assigns, or purchasers or encumbrancers with notice."

37 C. J., page 324, Par. 32, in part, is as follows:

> "But where the parties by their contract clearly show an intention to create a positive lien or charge upon real or personal property, whether then owned by the contractor or not, * * * it attaches in equity as a lien or charge upon the particular property as soon as the property comes into existence or the contractor acquires a title thereto, * * * ."

In Wright v. Bircher, 72 Mo. 179, l. c. 185, the court approvingly quotes from Justice Story in Mitchell v. Winslow, 2 Story 630, the following:

> "'It seems to me the clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether it is then <u>in esse</u> or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy."

In McQuie v. Peay, 58 Mo. 56, l. c. 58, the court says:

> "The doctrine has long been settled, that in addition to the actual, conditional conveyance of land, which constitutes a legal mortgage, courts of equity recognize certain other liens arising from the implied agreement of the parties, or the justice of the case, but not depending upon any express transfer of the title. These are termed equitable mortgages, and in general an agreement in writing to give a mortgage * * * will create a mortgage in equity, or a specific lien on the property so mortgaged."

It necessarily follows that the parties intend to create a lien upon real estate by including in the Supplemental Indenture the provision whereby after-acquired property comes within the terms of the mortgage and becomes additional security for the payment of the bonds.

CONCLUSION

It is our opinion that by the terms of the Supplemental Indenture in question the parties do thereby intend to create a lien upon real estate, and said Section 3096b, supra, provides that at the time of the filing for record of such an instrument in the City of St. Louis, there shall also be presented to the recorder of deeds the instrument or instruments representing the principal of said debt or obligation secured, and it becomes his duty to identify, stamp or write upon each such evidence of indebtedness so secured an identification thereof as being a note, bond or other evidence of debt described by such mortgage, deed of trust or other instrument of security.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

COUNTY WARRANTS: Under County Budget Act counties can protest warrants.

August 19, 1936.

7-3

FILED
81

Mr. Frank D. Sheible,
County Treasurer,
Hillsboro, Missouri.

Dear Sir:

This department is in receipt of your letter asking for an opinion regarding tax exemption warrants, which is as follows:

> "Have been in conversation with our local County Collector, Mr. William C. Kerckhoff, who spent the last two days of last week in Jefferson City at a collectors convention, and he advises me that in a speech or talk you made before the convention, you stated that County Treasurers are not permitted to register any county tax anticipation warrants of any character whatsoever under the new budget law.
>
> "Would be very grateful if you would have your office write me advising as to whether it is true that no warrants may be protested, as frankly, we have been registering warrants which bear a six per cent interest return and prior interpretations of the law in regard thereto have advised me that it was the proper method of handling them.
>
> "Certain it is however, that if the practice is illegal, this office wishes to immediately desist and would appreciate your immediate response to this query, so as to take the matter up at once with the County Court."

In 1933 the Legislature passed the County Budget Act (Laws of Mo. 1933, pp. 340 et seq.), the primary purpose of which was to promote efficiency and economy in county government. Under Section 2 thereof, proposed expenditures are classified in six classes, each class having priority over each succeeding class, but in reality only five classes are mandatory, the office of the sixth class appearing to be directory as to any surplus remaining after provision has been made for the other five classes.

Section 22 of the County Budget Act expressly repeals Sections 9874, 9985 and 9986, R.S. Mo. 1929 insofar as they conflict with the Act, and in addition any other sections which may be in conflict therewith. Prior to the passage of the Budget Act, Section 9874, R.S. Mo. 1929 provided for the apportionment and subdivision of the revenues of the several counties of the State into five classes, but said section contained no provision that each class should have priority over each succeeding class, and there was no provision to the effect that if the priorities were not sacredly preserved, the officers participating in the issuance of warrants contrary to the Act should suffer penalties.

In enacting the Budget Act, it was necessary to repeal Section 9985, R.S. Mo. 1929, which dealt with the apportionment of county funds, and Section 9986, which dealt with the manner in which the County Treasurer was to keep the funds in his hands.

Sections 12139 and 12140, R.S. Mo. 1929 contain the procedure for the County Treasurer, in keeping a list of the warrants issued and the manner in which the same are to be paid out, but do not appear to be in direct conflict with the Budget Act. Therefore, we conclude that the general statutes regulating and controlling funds of the county and the general financial set-up of the county are not abolished or in direct conflict with the County Budget Act; hence, do not prevent a county from issuing tax anticipation warrants, or to use the ordinary parlance of a county - "protested warrants".

The argument has been advanced that it was the purpose of the Budget Act to compel counties to proceed in the future on a strictly cash basis. It is our opinion, as before stated, that the purpose of the Act was to promote economy and efficiency in county government and to have a complete picture of the financial set-up of the county before the County Court at all times, thus eliminating poor business methods such as existed in the past; however, we do not believe it was the intention of the Legislature, nor can we glean it from the Act itself, that counties should have on hand funds before disbursing the same. In theory, our county government has been on a cash basis for a number of years.

In the case of Trask v. Livingston County, 210 Mo. 582, the Court makes the following pertinent statement:

> "Const. Art. 10, Sec. 12 * * * providing that no county shall be allowed to become indebted to an amount exceeding in any year the income and revenue provided for such year, permits the anticipation of the current revenues to the extent of the year's income in which the debt is contracted or created, but prohibits the anticipation of the revenues of any future years; the object of the provision being to abolish the credit system in the administration of county government and establish the cash system."

In the case of State ex rel. National Bank of Rolla v. Johnson, 162 Mo. 621, after stating that the purpose of Art. X, Section 12 of the Constitution was to place counties on a cash basis, the Court said:

> "Const. Art. 10, Sec. 12, prohibiting any county from becoming indebted in any year in an amount in excess of its revenues, does not invalidate a county warrant which is valid when issued, because the available funds are exhausted before it is reached for payment, but it is payable from the surplus of the revenue collected in subsequent years remaining after paying current expenses for such years."

Again, we repeat there is apparently no conflict in the County Budget Act and the sections of the statutes which remain unrepealed governing the financial structure of the county. We shall examine the Act itself to determine whether or not there is any direct conflict in the same. The terms of Section 4, page 345, throw some light on the question, as this section places the burden on the county clerk to require certain memoranda not later than the 1st day of February of each year, and among the items to be listed are:

Cash balance in county revenue fund January 1 of current year

Less outstanding warrants for preceding years as follows (list total by years)

Less all known lawful obligations against the county December 31, last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate)

Total unpaid obligations of the county on January 1 of current year

Net cash balance on hand January 1st of current year

If revenue is overdrawn the estimate shall show amount of overdraft in red ink.

Items under estimated receipts to which we will later make reference are:

If an overdraft, show in red ink

Estimated from taxes for ordinary revenue for current year

Total estimated county revenue for the current year from all sources

Ten per cent shall be deducted from total for delinquent taxes to get the net amount estimated for purposes of budget

If any expenditure under class six is anticipated the budget (so far as expenditures under class six is concerned) must be balanced on the actual cash on hand and not on estimated revenue.

Under the Constitution of Missouri, a county court cannot issue warrants in excess of the anticipated revenue; if such warrants

are issued, they are void and invalid. The Legislature seems to have taken the added precaution of stating that ten per cent shall be deducted from the total estimated revenue for delinquent taxes. We do not think, nor could it have been practical, for the Legislature in enacting the Budget Act to have compelled the county to have on hand cash for the five prior classes at the time the estimate of the classes was made. As always, the disbursements to be made of the funds alloted to the various classes is anticipated revenue; the revenue for an assessment made in 1935 is spent in 1936. Therefore, we conclude that there is no provision in the Budget Act itself which prevents a county from issuing tax anticipation warrants, or protested warrants.

Knowing that the county usually contracts with a local bank, which modestly charges 6% interest at the least, the question arises from what source is the county to derive funds, or how is the county to anticipate the amount of interest that must be paid? Bearing in mind that the county court has the authority to issue warrants not in excess of its total anticipated revenue, and that it would be unusual for a county to receive or collect its total anticipated revenue, and bearing in mind further that the Budget Act states the county court must deduct 10% of the total amount of the anticipated revenue for the year, it is our opinion that out of the 10% remaining could be estimated or alloted for the purpose of paying the interest on protested warrants. It is reasonable to assume that one of the reasons for deducting the 10% from the anticipated revenue by the Legislature was for this very purpose. The holder of a warrant is by statute entitled to interest, which the county is bound to pay, regardless of the county's authority to protest warrants.

A further question arises as to the class in which the county court could place the amount of the estimate for paying interest on protested warrants. The only class in which the estimate could be placed, in our opinion, is Class 5, which refers to contingent, incidental and emergency expense, and this, we think, the county court could do.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

TAXATION: Surplus of proceeds of tax sale to be paid only after order of County Court.

January 2, 1936. 1-4

FILED 83

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Slankard:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

> "A is the mortgagee of a certain tract of land. This land was sold for taxes and at the tax sale was bid in by A, and his bid left in the hands of the County Treasurer a surplus of $90.00. He now demands that the County Treasurer pay this surplus to him by virtue of his being the mortgagee of the original owner.
>
> Would like to know whether or not the County Treasurer is authorized to pay the surplus to A as the Mortgagee."

On April 5, 1935, this office rendered an opinion to the Honorable Joseph T. Tate, Prosecuting Attorney of Gasconade County, in which the following conclusion was reached:

> "In conclusion, it is our opinion that where a surplus exists after the sale of real estate for taxes, such surplus should be paid to the owner of the property, if only one person has any interest therein; that

> if the collector is satisfied that there is a valid recorded unsatisfied mortgage against the property, payment to the extent of the then mortgage debt could be made to the mortgagee and should not be paid to the mortgagor, and that if there is any doubt about the person to whom payment should be made the safest procedure for the collector would be to turn the money into the county treasury under R. S. Missouri 1929, Section 9939, as amended by Laws of 1933, page 425, 428, leaving proof of ownership to be made to the county court under that section."

We assume from your communication that the County Collector was doubtful as to the proper person who was entitled to the surplus and that he accordingly turned over the surplus to the County Treasury in accordance with Section 9959, page 428, Laws of Missouri 1933. Section 9959 also provides:

> "County Courts shall compel owners or agents to make satisfactory proof of their claims before receiving their money: Provided, that no county shall pay interest to the claimant of any such fund."

The foregoing provision unquestionably contemplates that some form of written demand should be filed by the claimant with the County Court and that the same should be heard and considered by the Court and a formal order made as to allowance or refusal of the claim. In this connection it might be stated that it would not be out of the way for the County Court or the Clerk thereof to advise the title holder of the property of the filing of such claim by the mortgagee so that in the event the title holder or mortgagor also desired to

present a claim for the surplus the County Court could be fully advised before making any order relative to the disposition of the surplus. We do not wish to be understood as holding that the latter procedure is a specific requirement of the law but merely make that suggestion for the purpose of eliminating if possible any misunderstanding on the part of the taxpayer as to the disposition of the proceeds of the sale.

We herewith enclose to you a copy of the opinion to Honorable Joseph T. Tate for your examination.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

FEES--COMPENSATION--CIRCUIT JUDGES: Per diem compensation of Circuit Judges when trying cases in another Circuit.

January 6, 1936.

1-6

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated December 17, 1935, is as follows:

> "I am enclosing some correspondence which I have had with Judge Walter A. Higbee, Circuit Judge of the Thirty-Seventh Circuit at Lancaster, Missouri relative to fees which he claims is due him as Special Judge at Trenton, Grundy County.
>
> "The certificate which we received from the County Clerk shows that the Judge only served one day; however, he disposed of three cases that day. My contention is that the Judge is entitled to $5.00 per day and expenses, while the Judges contention is that he is entitled to $5.00 for each case tried.
>
> "We would like an opinion from your department as to the amount of money I should pay Judge Higbee as Special Judge in this matter.
>
> "Please return the correspondence to my office for my files."

As per your request we are returning herewith your correspondence with Judge Higbee.

Section 3651 R. S. Mo. 1929, provides:

> "If, in any case, the judge shall be incompetent to sit, for any of the

causes mentioned in section 3648, and no person to try the case will serve when elected as such special judge, the judge of said court shall in either case set the case down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request another circuit or criminal judge to try the case; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said case; and he shall, during the trial of said case, possess all the powers and perform all the duties of the judge at a regular term of said court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require, and may grant a change of venue in said case to the circuit court of another county in the same circuit, or to another circuit or criminal court; and when said cause shall be removed to the circuit court of another county in the same circuit, it shall be the duty of the judge so requested to appear and hold the court at the time set for the trial of said case in the circuit court of the county to which said case shall be removed: Provided, that if the person elected as such special judge shall refuse to serve, or if the judge so requested shall fail to appear and hold the court at the time appointed for the trial of said case, the judge of said court shall reset said case for trial to suit the convenience of the judge so requested to try said case, or may notify and request the judge of some other circuit to appear and try said cause as heretofore provided. Should said judge so requested fail to appear and hold the court at the time appointed for the trial of said

> case, the judge of the court shall order a change of venue in said case to some other circuit. Said order may be made in term time, or by the judge of the court in vacation, by an order in writing, which the judge shall file with the clerk of the court in which such cause is pending. Whenever the judge so requested shall appear and hold the court for the trial of said case, he shall, in addition to the salary now allotted by law, receive his actual expenses and five dollars per diem for the time necessarily engaged in the trial of said cause, and in going to and returning from the place of trial, which shall be paid out of the state treasury upon the certificate of the clerk of the court in which such cause is pending. Whenever the special judge elected to try a cause shall appear and hold the court for the trial thereof, he shall receive ten dollars per day for the time necessarily engaged in such trial, and five dollars per day while going to and returning from the place of trial if he reside outside of the county where said cause is tried, to be paid out of the state treasury upon the certificate of the clerk of the court where said cause is tried."

CONCLUSION.

Section 3651 provides for calling in another Circuit Judge to try a case where the regular judge is deemed legally incompetent to try said case. All through the section it speaks of each case in the singular number. When providing for the compensation due the visiting judge, it speaks of each case singularly, and all through this section the words "case" and "cause" appear interchangeably.

We are of the opinion that when the Legislature provided compensation for the "actual expenses and five dollars per diem for the time necessarily engaged in the trial of the cause," the Legislature here thinks of each case as singular, and as one cause of action. In the matter of Judge Higbee, he was called in on four distinct cases. There were four cases separately responded to after four distinct and separate invitations, hence four causes were disposed of by him. His appearance was a separate appearance in each cause. By the terms of the Statute he could have appeared in one case and declined appearance in all the rest. In that case he would have been entitled to Five Dollars for that days's service, because he was necessarily engaged in the trial of that cause.

Since he was separately called, and appeared in four distinct cases, we believe that it was the intention of the Legislature to compensate him at the rate of Five Dollars per day per case, and such is our opinion.

The facts show that Judge Higbee was not called in to preside over a part or a term of Court, in which circumstance his compensation would be on a per diem basis, no matter how many cases were disposed of each day.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

BARBER BOARD: Undesirables cannot be eliminated from the profession by health and sanitation rules promulgated by the Board.

- -

January 17, 1936.

120

FILED
83

Mr. J. H. Skaggs, Treasurer
State Barber Board
405, 100 N. Broadway Building
St. Louis, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 23, 1935, which reads as follows:

> "Inasmuch as section 13527 revised statutes of Missouri 1929 sets out that persons following the occupation of barber at the time this law went into effect, which was in the year 1921, and who made application for a license within 90 days from its effective date, should be issued a license without passing the examination before the State Board.
>
> "However, section 13528 sets out the qualifications that a registered barber should possess, namely; that he must be past the age of 19, of good moral character, free from infectious or contagious diseases; and has either studied the trade as an apprentice under a qualified and practicing barber, or studied the trade for at least two years in a properly appointed and conducted barber school or college under the instructions of a qualified barber, or practiced in another State for at least two years.
>
> "Now, the State Barbers' Board is of the impression that inasmuch as during a 90 day period following August 27, 1935 which was the effective date of the amendment to our license law, making it state wide, that we were to issue license to barbers in towns throughout the

state of less than 5,000 population without having them pass the examination before the said Board, as was done in 1921.

"However, we are of the impression that this means simply that barbers not be required to go through the routine of an examination, and that the examination fee of $5.00 be omitted.

"However, that the qualifications as set out in section 13528 should prevail when issuing license without examination the same as if they were being obtained by passing examination; this being the procedure that was followed at that time.

"I would therefore appreciate an opinion from you as to whether or not the Board should require that applicants for license without an examination should possess the qualifications set out in section 13828 the same as if he were obtaining his license by passing the examination.

"Please give us this opinion at your earliest possible convenience, as we have several cases in our files that will be disposed of in accordance with your opinion in this matter."

Section 13522 R. S. Mo. 1929 provides:

"It shall be unlawful for any person to follow the occupation of a barber in this state, unless he shall have first obtained a certificate of registration, or permit, as provided in this chapter: Provided, however, that nothing in this chapter contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided."

Section 13523 R. S. Mo. 1929, provides in part:

> "A board of examiners, to consist of three persons, citizens of this state for at least three years prior to their appointment, is hereby created to carry out the purposes and to enforce the provisions of this chapter. * * * * Said board shall, with the approval of the state board of health, prescribe such sanitary rules as it may deem necessary, with particular reference to the precautions necessary to be employed to prevent the creating and spreading of infectious or contagious diseases. A copy of such rules shall be furnished each person to whom a certificate of registration or permit is granted. * * * *."

Section 13524 R. S. Mo. 1929, provides in part:

> "* * * * Provided, this chapter shall not apply to cities or towns in this state which now have or hereafter may have a population of less than five thousand (5,000) inhabitants."

Section 13527 R. S. Mo. 1929 provides:

> "Every person now engaged in the occupation of barber in this state shall, within ninety days after the approval of this law, file with the secretary of said board a written statement, setting forth his name, residence and the length of the time during which the place where he has practiced such occupation, and shall pay to the treasurer of said board two dollars; and a certificate of registration entitling him to practice the said occupation for the fiscal year ending January thirty-first, 1922, thereupon shall be issued to him and the holders of

> such certificates shall annually, within thirty days before the expiration of their respective certificate, make application for the renewal of same, stating the number of expiring certificate, and shall in each case pay to the treasurer of said board the sum of two dollars therefor. For any and every license or certificate given or issued by the board a fee of two dollars shall be paid by the person receiving the same."

The original barber license law was approved on April 7, 1921. In ex parte Lucas, 160 Mo. 218, l. c. 232, our Supreme Court held a barber law legal because such is a health measure, and they quoted approvingly from the Supreme Court of Minnesota as follows:

> "Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interest of the public health and morals, are everywhere upheld and sustained. Such laws are within the police power of the State, and are universally sustained where enacted in the interest of the public welfare. The question presented in cases where the validity of such laws is called in question is no longer the power or authority of the Legislature to enact them, but whether the occupation, calling or business sought to be regulated is one involving the public health and interests. A person engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling, protection from intrusion by incompetents and others inimical to the public good."

Since the approval of the above act, on April 7, 1921, there has been but one amendment where the above quotation from Section 13524 was stricken from the Act in the Laws of 1935, p. 191. The legal effect of changing Section 13524 was to make a general law out of all provisions set out in Chapter 103 R. S. Mo. 1929, where prior to the time of the changed section the provisions of the chapter did not apply to cities or towns of less than 5,000 inhabitants.

The change effected in Section 13524 R. S. Mo. 1929 amounts to a reenactment of the remaining provision of Chapter 103, as new law, insofar as barbers practicing in cities or towns of less than 5,000 inhabitants are affected by said chapter. The new law requires of barbers practicing in cities and towns of 5,000 inhabitants the possession of a formal license to practice their profession, and without the license their practice is unlawful.

The immediate purpose of the barber license law in Missouri is not to prohibit the practice of an honorable profession, but rather to regulate and control the practice in the whole State without exception. The fee for license is only incidental to the regulations prescribed, and is taxed only to provide funds for the purpose of inspecting and controlling unhealthly practices in the profession. The Act was not passed as a revenue measure, but as a health measure. The Board in administering the Act should administer it as a health measure, and not as a tax measure, and from your letter we believe you are so endeavoring.

It is obvious that the Legislature, by this amendment, intended to include those who practice barbering any place in the State within reasonable health regulations. The solicitation and profession of men who ignorantly undertake to practice barbering is a threat to public health, and it was in the exercise of its police power that this Act was passed by the Legislature in the first instance and amended in the second instance.

Section 13528, noted in your request, was not intended to impose legislative conditions on persons actively and legally in the occupation of barbering before being eligible for a license. Its provisions relate only to the prospective barber and apprentice, and barbers who were

legally practicing the profession in cities of less than 5,000 inhabitants at the time the 1935 amendment went into effect, do not come within the provisions of section 13528. Its provisions as such have no force in eliminating undesirable practicing barbers from the profession.

Section 13522, supra, since the 1935 amendment, plainly requires all barbers in this state to have either a certificate of registration or a permit while practicing their profession in Missouri.

Section 13523, supra, designs the Board and gives the Board power to make sanitary and health rules approved by the State Board of Health. Under the power to make rules the Board may properly rule that present applicants for barber license in cities and towns of less than 5,000 inhabitants should possess the health and sanitary qualifications set out in Section 13528, but the Board has no power and cannot prohibit otherwise qualified barbers from obtaining a license by any rule which does not have the earmarks of a health or sanitation rule. Some of the provisions of Section 13528, are not, strictly speaking, health or sanitary qualifications and should not be required of a practicing barber who can otherwise qualify under the general health and sanitation rules laid down by the Board. Under the provisions of Section 13523, supra, the Board's power to make general health and sanitation rules binding upon the profession is only limited by an approval of said rules by the State Board of Health. It is for the noncompliance of legal rules as set out in Section 13532 that the Barber Board can eliminate undesirables from the profession.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

STATE BOARD OF ACCOUNTANCY: Subject to the terms of Sec. 1 Laws of Mo. 1933, p. 416, relating to boards, bureaus and commissions paying all fees into the State Treasury.

January 18, 1936.

1-20

FILED
83

Honorable Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

We are in receipt of your letter of December 18 with which you enclose copy of your letter of December 10 to Mr. J.H. O'Connell, Secretary of the State Board of Accountancy and Mr. Fraser's letter of December 17 in reply thereto. Your letter of December 10 to Mr. O'Connell is as follows:

> "In checking our records I find that you have failed to comply with Section 1, on page 415 of the 1933 Laws of Missouri, which provides among other things that all fees, funds and money from whatever source received from any department, must be deposited with the State Treasurer.
>
> "In pursuance of that law, the last Legislature on page 85, Section 1, 1935 Laws, made an appropriation for the payment of the expenses of your Board. We are unable to find where you have ever remitted to the State Treasurer any of your fees and I am calling your attention to this matter and sending a copy of my letter to Mr. Jeff K. Stone, President State Board of Accountancy, St. Louis, Mo.
>
> "I contemplate making an audit of your Board in the very near future, and would like to have these provisions of the law complied with before the audit is made."

Your letter of December 18 to this department is as follows:

> "I am enclosing a copy of a letter which I have written to the State Board of Accountancy and their reply to my letter. I would like an opinion from your department as to whether the State Board of Accountancy comes under the provisions of S.B. 124 found on page 415 of the 1933 Missouri laws."

It appears from Mr. Fraser's (Treasurer of the State Board of Accountancy) letter that his contention is that the State Board of Accountancy is not subject to the provisions of Sec. 1, Laws of Missouri, 1933, page 415, which provides:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State) shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided,

> that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

Section 13711, R.S. Mo. 1929 creates the State Board of Accountancy, and is as follows:

> "The Governor shall, within thirty days after the taking effect of this chapter, appoint five persons, who shall constitute the board of accountancy, each member of which shall have been engaged in the reputable practice as a public accountant for a continuous period of three years immediately preceding the passage of this chapter, one of which shall have been in the State of Missouri. The persons first appointed shall hold office for one, two, three, four and five years respectively. Upon the expiration of each of said terms, a member, who shall be a holder of a certificate issued under this chapter, shall be appointed for a term of five years."

Section 1, supra, (Laws of Mo. 1933, p. 415) is plain and definite in its terms and mentions <u>boards</u> specifically. The Supreme Court has never definitely determined just what boards, bureaus, commissions, etc. come within the terms of Section 1; however, the section states: "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission * * *" and the proviso excepts certain funds and fees, none of which we can construe as to exempt the State Board of Accountancy.

In the case of State v. Smith, 75 S.W. (2d) 828, the

Court, in discussing the status of the State Barber's Board, with reference to an additional appropriation having been made to said board, said (l.c. 830-831):

> "Relator makes the further contention that, if section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637), be construed as meaning that the per diem and expenses of the board cannot be paid out of any fund except the fund created from fees collected by the board and paid into the state treasury, such a construction would not avail respondent in this proceeding.
>
> "Relator's argument in support of this contention, taken from his reply brief, reads as follows:
>
> "'For as we pointed out in our original brief, the fees which have been collected and paid into the State Treasury by the Board far exceed the expenses and compensation to which they are entitled under said Section 13525. On February 28, 1933, the General Assembly owing to an emergency, transferred the funds which had accumulated from the fees collected by the Board, $25,308.60, to the General Revenue Fund. (Laws 1933, p. 415) If the Legislature could not appropriate money from the General Revenue to pay the expenses and per diem of the members of the Board, then by the same token it could not transfer to the General Revenue the fund set apart by law for payment of the expenses and compensation of the Board. So that the appropriation of $3,000 for the uses of the Board was in legal contemplation an appropriation from the Board of Barber Examiners Fund then commingled with the General Revenue:"
>
> "We do not agree with relator's contention on this point. Section 13525, R.S. 1929 (Mo. St. Ann. Sec. 13525, p. 637), which provides that the salaries and expenses of the board shall be paid by warrants drawn on the

fund created from fees collected by the board and paid into the state treasury, makes the following further provision:

> '* * * And any surplus remaining in said fund annually after payments above authorized shall be paid into the public school fund of this state.'

"By the express provisions of section 13525, R.S., any surplus remaining in the board of barber examiners' fund at the close of the years 1931 and 1932 passed to the public school fund of the state. We recognize the right of the Legislature to provide by law that the surplus in such fund shall be transferred to the general revenue fund instead of the public school fund, but the act of February 28, 1933 (Laws 1933, p. 415), which purports to transfer to the general revenue fund all sums of money in the state treasury to the credit of the board of barbers' fund, etc. would not have the effect of transferring a surplus remaining in such fund for the years 1931 and 1932, the title to which had by law passed to and vested in the public school fund before the transfer act of February 28, 1933 was passed. This act does not purport to transfer any definite amount of money to the general revenue fund. It simply directs the state treasurer to transfer to the general revenue fund all sums of money in the state treasury to the credit of the numerous funds named in the act, including the board of barbers' fund. The fact, if it be a fact, that the records had not been adjusted to show that the surplus remaining in the board of barbers' fund at the close of 1931 and 1932 had been paid into the public school fund of the state, would not change the legal status of the surplus remaining in that fund at the end of each year. By express provision of Section 13525, R.S. 1929 (Mo. St.

> Sec. 13525, p. 637), such surplus became the property of the public school fund with the ending of each year. It results that the act of February 28, 1933, did not transfer the $25,308.60 from the board of barbers' fund to the general revenue fund, because that amount was not in the board of barbers' fund at that time. It had become the property of the public school fund of the state before the act of February 28, 1933, was passed. The only possible effect that act could have, so far as this case is concerned, was to transfer to the general revenue fund that part of the $25,308.60 which was collected by the board during January and February, 1933, which, no doubt, was a very small part."

Although this case does not definitely decide the point now under discussion, we call your attention to the fact that the said Barber Board is maintained and functions, with respect to fees, similar to the State Board of Accountancy, and the State Barbers' Board is amenable to Section 1, supra.

In addition, the Legislature saw fit to make an appropriation for the State Board of Accountancy (Laws of Mo. 1933, p. 20), and in 1935 the Legislature again made an appropriation (Laws of Mo. 1935, p. 85, Sec. 1).

CONCLUSION

It is the opinion of this department that it was the intention of the Legislature in enacting Sec. 1, supra, to compel every state board, bureau, commission, etc. to pay into the treasury all of their fees and moneys, same to be placed to the credit of said board, bureau or commission, and to be used by said board, bureau or commission only when an appropriation was made by the legislature in conformity with Section 19, Article X of the Constitution of Missouri.

We are further of the opinion that the State Board of Accountancy is subject to the terms of Section 1, Laws of Missouri, 1933, page 415 and thatall fees coming into the hands of said Board should be paid into the treasury in conformity

with said section, and that said Board is amenable to the terms of Section 1 the same as any other board, bureau or commission.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SHERIFF FEES: Not entitled to $1.25 per day for prisoners committed to jail upon default of bond to await preliminary.

January 20, 1936.

FILED
83

Honorable Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your letter of January 15, which is as follows:

> "This office has received a fee bill from Caldwell County wherein the sheriff has charged two days' custody of prisoner while undergoing examination preparatory to commitment when number of days shall exceed one, per day $1.25, making a total of $15.00, as there were two defendants charged and each defendant was held in jail six days. The facts surrounding this item are as follows:
>
> "On December 3, 1935, a warrant was issued for these two defendants and on that day they were arrested by the Sheriff of Caldwell County and taken before the justice of the peace for arraignment. They entered a plea of not guilty and in default of bond were committed to jail to await preliminary hearing, which preliminary hearing was set for December 9, 1935.
>
> "Therefore, we request an opinion as to whether or not the sheriff is entitled to the sum of $1.25 per day as provided by Section 11791, R.S. Mo. 1929, in view of the fact that defendants were held on a commitment issued by the justice of the peace in default of bond."

Section 11791, R.S. Mo. 1929, provides in part as follows:

> " * * * The sheriff or other officer who shall take a person charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed by the court having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, * * * "

From the facts as stated in your letter, the defendants were apprehended on December 3, 1935 and immediately taken before a Justice of the Peace; they were unable to give bond and were taken by the sheriff to jail to await preliminary hearings, which were set for December 9, 1935. Thus elapsed a period of six days and you desire to know whether or not the sheriff can charge a fee of $1.25 per dayfor each day that he may have had said defendants under his charge, when the number of days shall exceed 1.

We think the question is definitely decided in the case of State ex rel. v. Wofford, 116 Mo. 220, wherein the Court said (l.c. 224-226):

> "When the case was first called for trial before the justice, and was continued, the justice made an entry on his docket committing the prisoner to jail to await trial. After this order was made and the cause continued, the prisoner was not <u>undergoing</u> an examination within the meaning of that

provision of the statute which allows to sheriffs, marshals and other officers $1.25 per day, for every day he may have a prisoner under his charge undergoing an examination. If the order of commitment was complied with the prisoner was then within the prison walls, and the statute has no application to such case. The case of Thomas v. County of St. Louis, 61 Mo. 547, only involved the question of the right of a sheriff to the fee of one dollar for placing a prisoner in jail whom he had arrested on a capias, and this court held that he was not entitled to it as the mere fact of placing the prisoner in jail by him was not a commitment, and that the words 'committing any person to jail' as found in the statute relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions.

"Section 4028, Revised Statutes, 1889, is as follows: 'A magistrate may adjourn an examination of a prisoner pending before himself, from time to time as occasion requires, not exceeding ten days at one time, and to the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by said prisoner, said magistrate shall allow such an adjournment on motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise, he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance for such further examination, and for want of such recognizance he shall be committed.'

"This section expressly provides that a magistrate may from time to time commit a person charged with crime before him to jail to answer for further

examination touching charges pending against him before such justice.

"Section 4030, Revised Statutes 1889, is as follows: 'When such person fails to recognize, he may be committed to prison by an order under the hand of the magistrate, stating concisely that he is committed for further examination on a future day, to be named in the order, and on the day appointed he may be brought before the magistrate, by his verbal order to the officer who made the commitment, or by his order in writing to a different person.'

"When the officer having charge of a prisoner shall take him from the county in which the offender is apprehended to that in which the crime was committed, or when the officer shall remove the prisoner from one county to another for any cause authorized by law, or when he shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day at a time during such examination, then he is entitled to $1.25 per day for every day that he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another."

CONCLUSION

In view of the foregoing decision, it is the opinion of this department that the sheriff is not entitled to the fee of

$1.25 per day for the number of days as mentioned in your letter.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

MOTOR VEHICLE LAW--CRIMES: Crime of operating a motor vehicle in a reckless manner.

2-15

February 10, 1936.

FILED
83

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion dated January 24, 1936, which is as follows:

> "Is Section 7775, R. S. Mo., 1929 a part of the Criminal Law taken together with Section 7786, para. (D) so that a man can be charged by information or indictment with the crime of reckless driving. In other words, does Section 7775 together with para D of section 7786 define a crime?"

Section 7775 R. S. Mo. 1929, provides a rule of conduct affecting every person who operates a motor vehicle in Missouri. Said section reads in part as follows:

> "Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person, * * * *residences or schools: * * * *."

It is to be noted that the word "prosecution" appears in said section which indicates that the Legislature had in mind criminal prosecutions as well as civil suits.

Section 7786 R. S. Mo. 1929, provides a criminal penalty when one violates the provisions of Section

7775, supra, and under the provisions of Section 7786 several specific acts of persons are separately punishable, and under paragraph (d) of said section there is a sweeping penalty provision which reads:

> "(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

It happens that conduct required of motor vehicle drivers, as prescribed in section 7775, supra, is punishable, and punishable only under the provisions of paragraph (d) of section 7786, supra.

Kelley's Criminal Law (4th Ed.) page 2, Section 2, provides:

> "There are, and always were, some acts for which the offender is held accountable, both to the individual injured and to the public, such as assaults and batteries, malicious trespass, libel and the like. In any such case the party may be punished criminally, an the injured party may prosecuted a civil action and recover, not only actual, but punitive damages. And the civil remedy has been extended by statute to the personal representative, or husband or wife, or parent or child, of the injured party, who may recover against the wrongdoer in cases of manslaughter or murder, when the deceased might have maintained an action for the injury had he lived. On the other hand, some acts which are merely private trespasses are punishable criminally, such as unlawfully damaging or taking fruit from a tree, or willfully destroying

property or crops, or cutting and removing timber, removing stone, etc., from the realty."

Here you have a rule of civil conduct laid down in one section of law and in another section a criminal penalty provided where one's prescribed conduct falls short of statutory requirements. There is nothing unusual in a section of a statute setting out a precise and prescribed rule of civil conduct, and in another section providing a penalty for a violation thereof. Where such is the case crimes have been alleged and proved under the very motor vehicle law now under consideration.

It is not unusual for unlawful conduct to give rise to both tort action and criminal action.

We are of the opinion that section 7775, construed together with paragraph (d) of section 7786 defines a crime which is punishable under the Missouri Code as other crimes are punishable.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

ROADS & BRIDGES: Special Road District has exclusive supervision over roads within its district, to the exclusion of the county highway engineer; tools and machinery belonging to special road district also excludes right of supervision of county highway engineer.

February 11, 1936. 2-15

FILED 83

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Slankard:

This is to acknowledge your letter as follows:

"I would appreciate your opinion on the following:

"What, if any, supervisory power would a county highway engineer, appointed by the County Court of this county have over the Commissioners of a Special Road District. Would also like to know what, if any right he has over the tools and machinery belonging to the Special Road District."

For the purpose of this opinion we assume that the Commissioners of the Special Road District, referred to in your letter, are those provided for by Article 9, Chapter 42, R. S. Mo. 1929.

I.

The county highway engineer is appointed by the county court. Section 8006, R. S. Mo. 1929. Section 8013, R. S. Mo. 1929, relates to the supervision that the county

highway engineer has over the public roads of the county, and provides as follows:

> "The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. No county court shall order a road established or changed until said proposed road or proposed change has been examined and approved by the county highway engineer. No county court shall issue warrants in payment for road work or for any other expenditure by road overseers, or in payment for work done under contract, until the claim therefor shall have been examined and approved by the county highway engineer."

However, special road districts, formed under and by virtue of the provisions of Article 9, Chapter 42, supra, have the exclusive supervision of roads in said districts, which, in our opinion, is an exception to the county highway engineer's supervision, by virtue of Section 8013, supra. Section 8033 of said article and chapter provides as follows:

> "Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands

> at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

You will note that the board of commissioners in special road districts have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein.

The Supreme Court of Missouri in State ex inf. v. Meyer, 12 S. W. (2d) 489, in commenting on Section 8033, supra, said the following (l. c. 490):

> "Neither the city council nor the county court has any control over the public highways within the district outside of the corporate limits of the city. Such control is lodged exclusively with the board of commissioners."

From the above it is our opinion that the county highway engineer has no supervisory power over the commissioners of a special road district.

II.

Section 8012, R. S. Mo. 1929, places the duty upon the county highway engineer to be custodian of all road tools, except as may be otherwise provided by law. Said section reads as follows:

> "The county highway engineer shall be custodian of all tools, material and machinery belonging to the road districts and to the county, except as may be otherwise provided by law. When delivering to any road overseer the tools and machinery belonging to the district, he shall require from the overseer an inventory and receipt for all such tools and machinery, and the overseer shall be responsible for the proper care and handling of said tools and machinery, and shall see that they are properly kept when not in use, and shall account for the same to the county highway engineer."

As to tools and machinery of the special road district, Section 8032, R. S. Mo. 1929, provides as follows:

> "The county court shall, upon the organization of the board of commissioners of such special road district, deliver to such board all the tools and machinery used for working roads belonging to the districts formerly existing within the territory embraced in such special district, taking a receipt from the board for the same, and such board shall keep and use such tools and machinery for constructing and improving public roads."

From the above it is our opinion that the county highway engineer has no right over the tools and machinery belonging to the special road district.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

APPROPRIATIONS: $1680 of Appropriation Act of 1935 to State Service Officer invalid and void because of conflict with Sec. 4 of Act creating office of State Service Officer (Laws of Mo. 1931, p. 263)

March 27, 1936. 3-30

FILED 83

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of March 26 regarding an opinion as to the following:

> "HB 493 found on pages 263 and 264 of the 1931 Missouri Laws creates the office of State Service Officer. Section 4 of that Act fixes the salary and expenses of that office.
>
> "Section 31, page 32 of the 1935 Missouri Laws makes an appropriation for the State Service Officer in excess of the amount fixed in Section 4 of the 1931 Laws.
>
> "Please advise me how much money I may legally pay to the State Service Officer for the operation of his office during the biennium of 1935 and 1936."

In 1931 the General Assembly of the State of Missouri created the office of State Service Officer. Section 4 of said Act (Laws of Mo. 1931, p. 264) provides:

> "The compensation of the state service officer shall be two thousand four hundred dollars ($2400.00) per year with an allowance not to exceed six hundred dollars ($600.00) per year for expenses of said office, to be paid from the athletic commission fund."

In 1935 the General Assembly of the State of Missouri made the following appropriation for the purpose of paying the salary and office expense of the State Service Officer (Laws of Mo. 1935, p. 32):

A. Personal Service:
Salary of the state service officer.....$4,800.00

D. Operation:
For office expense consisting of general expense, including communication, printing and binding, transportation of things, travel, material and supplies; consisting of stationery and office supplies, and special material and supplies.....2,880.00 "

The appropriation of $2,880.00 for office expense of the State Service Officer is clearly contrary to Section 4 of the Act creating the office, and is, in effect, an attempt to amend said law and to legislate by means of an appropriation act. This is impossible.

Article IV, Section 28 of the Constitution of the State of Missouri provides:

> "No bill (except general appropriation bills, which may embrace the various subjects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section forty-four of this article) shall contain more than one subject, which shall be clearly expressed in its title."

In the case of State ex rel. Hueller v. Thompson, (Supreme Court of Missouri) 289 S.W. 338, the Court said:

> "It is manifest that the real purpose of this provision was an undertaking to regulate, determine, and fix the salaries of all such officers or employees affected by the Appropriation Act whose compensation might not be fixed at all by

> statutory law, or, if at all, where the statute fixed a maximum only. This provision has no other character than that of general legislation, and to inject general legislation of any sort into an appropriation act is repugnant to the Constitution (article 4, sec. 28, Constitution of Mo.), and the appropriation bill, as provided by the Constitution (article 4, sec. 28, may have a plurality of subjects, while a bill for general legislation may have but one.
>
> "An appropriation bill is just what the terminology imports, and no more, Its sole purpose is to set aside moneys for specified purposes, and the lawmaker is not directed to expect or look for anything else in an appropriation bill except appropriations.
> * * *
> "Here we have an appropriation act which not only appropriates money for the various subjects embraced therein, but which attempts to fix and regulate all salaries affected by the act which either have not been fixed by any statute, or not definitely fixed, which would include all salaries where the maximum alone was named. That the Legislature has the right by general statute to fix salaries is beyond question, but has it the right to do so by means of an appropriation act? We think not. * * * * * "

In the recent case of State ex rel. Davis v. Smith (Supreme Court of Missouri, 1934), 75 S.W. (2d) 828, the Court held that an appropriation act appropriating money contrary to the express provision of a statute which provided that the Board of Barber Examiners should be self-sustaining from fees collected by said Board was void. The Court in its opinion said (l.c. 830):

> "We cannot excape the conclusion that if section 13525, R.S., is still the law, and if it provides that the salaries and expenses of the board shall be paid out of the fund created from the fees collected by

the board, and out of that fund only, the attempt to appropriate money out of the general revenue fund to pay any part of such salaries or expenses is contrary to the existing law of the state, as declared in section 13525, supra."

CONCLUSION

In view of the foregoing, it is the opinion of this department that the Appropriation Act of 1935 (Laws of Mo. 1935, p. 32) appropriating $2,880.00 for expenses of the office of the State Service Officer is invalid and void as to $1,680.00 of said appropriation, for the reason that it conflicts with the express provision of Section 4 of the Act creating the office of State Service Officer (Laws of Mo. 1931, p. 263). However, inasmuch as Section 4 of said Act specifically provides that $600.00 per year may be allowed for the expenses of said office, it is our opinion that you as State Auditor may legally pay this amount from the appropriation to the State Service Officer for the operation of his office.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

JWH:AH

BOARD OF FUND COMMISSIONERS: Not authorized to invest public school fund.

PUBLIC SCHOOL FUND- To be invested at direction of State Board of Education.

42

March 28, 1936

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Acknowledgment is made of your recent request for an opinion from this office, on the following matter:

> "Is it permissible under the law for the Fund Commission to sell building bonds which they have now authorized to be sold for investment of funds in the State School and Seminary Funds at par? Under the provisions of Section 9724, R. S. Mo.1929, I believe the Fund Commission's authority to buy state bonds for investment purposes is clear.
>
> You will recall that at the Board meeting held on the 18th day of February,1936, it was the opinion of the Board that it reserve the right to purchase $50,000.00 of the State of Missouri Building Bonds Series "B", which they expect to sell on the 7th day of April on the bid price. If the Fund Commission has the right to sell $50,000.00 of said bonds to these various accounts, then it

> would only be necessary to advertise for sale to the public $1,950,000.00 in lieu of $2,000,000.00 authorized by the Board."

Before concerning ourselves with particular statutes bearing upon the questions involved, we direct attention to the pertinent constitutional provisions.

Section 9 of Article XI, which was derived from the Constitution of 1865, reads as follows:

> "No part of the public school fund of the State shall ever be invested in the stock or bonds or other obligations of any other State,or of any county, city, town or corporation; and the proceeds of the sales of any lands or other property which now belong or may hereafter belong to said school fund shall be invested in the bonds of the State of Missouri, or of the United States."

By virtue of this provision the public school fund of the State could only be invested in bonds of the State of Missouri or of the United States. The public school fund referred to in that provision is obviously the "public school fund" referred to in Section 6, of Article XI of the Constitution, which reads, in part, as follows:

> "The proceeds of all lands that have been or hereafter may be granted by the United States to this State,and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other

> property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund* * * * * *."

Therefore, the moneys which are a part of the public school fund set up and described in Section 6 of Article XI, may only be invested in bonds of the State of Missouri or of the United States.

We now direct attention to the provisions of Article 24, Chapter 57, Revised Statutes Missouri 1929. An examination of Section 9712, Revised Statutes 1929, reveals it to be practically a re-enactment of Section 6 of Article XI of the Constitution, except that it provides that the public school fund shall be invested under the direction of the State Board of Education "in the bonds of the United States, bonds of the State of Missouri, or state certificates of indebtedness."

Section 9715 is more clear in its direction respecting the investment of the fund and provides, in part,

> "Whenever there shall be in the treasury or elsewhere, subject to the order of the treasurer, any money belonging to the capital of the public school funds, the state auditor shall make reports thereof to the state board of education, who shall direct the investment of the same in bonds of the United States, bonds of the State of Missouri or state certificates of indebtedness.* * * * * * *"

By these statutory provisions the State Board of Education is charged with the duty of investing the public school funds .

Before concluding this opinion it seems desirable and advisable to refer to other constitutional and statutory provisions which may appear to be conflicting with the decision reached herein. We first refer to Section 26, of Article X of the Constitution, which reads as follows:

> "All certificates of indebtedness of the State to the 'public school fund' and to the 'seminary fund' are hereby confirmed as sacred obligations of the State to said funds, and they shall be renewed as they mature for such period of time and at such rate of interest as may be provided for by law. The General Assembly shall have the power to provide by law for the issuing certificates to the public school fund and seminary fund, as the money belonging to said funds accumulates in the State treasury: Provided, That after the outstanding bonded indebtedness has been extinguished, all money accumulating in the State treasury for above named purposes shall be invested in registered county, municipal or school district bonds of this State of not less than par value. Whenever the State bonded debt is extinguished or a sum sufficient therefor has been received, there shall be levied and collected, in lieu of the ten cents on the one hundred dollars valuation now provided for by the statutes, an annual tax not to exceed three cents on the one hundred dollars valuation, to pay the accruing interest on all the certificates of indebtedness, the proceeds of which tax shall be paid into the State treasury and appropriated and paid out for the specific purposes herein mentioned."

It should be noted that the foregoing constitutional provision was adopted at an election held November 4, 1902. At the time of that election the bonded indebtedness of the State of Missouri was practically extinguished, and, therefore, the provisions of Section 9 of Article XI of the Constitution would prevent the investment of the public school fund and the seminary fund in anything other than bonds of the United States.

Pursuant to Section 26 of Article X, the legislature enacted Section 9724 authorizing the State Board of Fund Commissioners to invest the money in the Public School Fund and in the Seminary Fund in registered county, municipal and school district bonds of this State. Subsequently this section was amended so as to purportedly authorize the investment of such fund in levee and drainage district bonds. We shall not pass upon the constitutionality of this amendment. It is certain, however, that Section 9724 was enacted for the purpose of authorizing the board of fund commissioners to invest the applicable funds in these bonds. No authority is given to invest the funds in State Bonds or in United States Bonds. Without going into the apparent conflict between these constitutional and statutory provisions, no authority to invest the public school and seminary funds in State bonds is placed in the Board of Fund Commissioners.

In our investigation of this law we have not overlooked the provisions of Section 11464, Revised Statutes Missouri 1929, which authorized the Governor, Treasurer and Auditor to invest the public school fund and the seminary fund in bonds issued pursuant to authority of the first three subdivisions of Section 44 of Article Iv of the Constitution. Needless to say, the building bonds are issued pursuant to authority of the fourth subdivision of Section 44 of Article IV, and therefore this section is not applicable to the instant problem.

CONCLUSION

It is, therefore, the opinion of this office that the State Board of Fund Commissioners is without

authority to purchase state bonds for the public school fund.

Respectfully submitted,

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

HGW:LC

APPROPRIATIONS: Claim filed by St. Louis Training School for Feeble-minded cannot be allowed by the Board of Eleemosynary Institutions and audited by the State Auditor.

April 2, 1936. 4/3

FILED 83

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of March 26 requesting an opinion as to the following:

"H.B. 113, page 221, of the Laws of 1931 provides that 'any county or city of this state which shall maintain from public funds a hospital for the care, detention or treatment of the insane, shall be entitled to receive $8.00 per month per patient from the State of Missouri.' You will note that there is no mention at all in H.B. 113 of any training school for feeble-minded being entitled to share in the appropriation from the State.

"Section 1 in H.B. 541, found on pages 123 and 124 of the 1935 Laws of Missouri makes an appropriation for $600,000 to carry out the provisions of HB 113 passed in 1931. Section 46-C, found on page 177 of the 1935 Laws appropriates $2,400,000 at the rate of $12.00 per month for the patients in the four hospitals of this state and $22.50 per month for the patients in the tubercular sanatorium at Mt. Vernon, no mention being made of the Training School for feeble-minded at Marshall, Missouri.

"It is my contention that the Legislature did not intend that the State should contribute anything towards the support of either the Training School for Feeble-minded operated by the City of St. Louis, or the Training School for Feeble-minded operated by the State at Marshall.

"I am in receipt of bills from the City of St. Louis at the rate of $8.00 per month amount-

> ing to $84,463.52 for the quarter ending December 31, 1935 for the St. Louis Training School for Feeble-minded in St. Louis, which amount I have rejected. I have been requested by the Comptroller of the City of St. Louis to secure an opinion from you as to whether the appropriation found on pages 123 and 124 in the amount of $600,000 in the 1935 Laws applies to the School for Feeble-minded in the City of St. Louis."

In 1931 the Legislature enacted Secs. 1, 2 and 3, Laws of Mo. 1931, Sec. 1 being as follows: (p. 221)

> "Any county or city in this state which shall maintain from public funds a hospital for the care, detention or treatment of the insane, which hospital is properly equipped as to facilities, staff and personnel, shall be entitled to $8.00 per month, per patient, upon proper report filed and sworn to by superintendent or surgeon in chief of such hospital for the insane, when such proper report is filed with the state eleemosynary board. Such reports shall be filed quarterly and shall show name, address and other necessary data so as to properly identify and authenticate the patients of such insane institution."

Section 2 of said Act, providing for partial support for inmates of hospitals maintained by cities or counties, gives the Eleemosynary Board authority over such hospitals and contains these words: "The State Eleemosynary Board of Missouri shall have authority to examine by proper medical authorities any and all such institutions for the insane".

Section 3 of said Act provides that upon the sworn statement of the Superintendent or Chief Surgeon of such hospitals for the insane, the State Treasurer shall pay $8.00 per month per patient.

Section 1, Laws of Mo. 1935, p. 123 is as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the state revenue fund, the sum of six hundred thousand dollars ($600,000.00) or so much thereof as may be necessary for the purpose of paying to mental hospitals, established and maintained by any county or city not within a county in this state, the sum of $8.00 per month, for each indigent insane person, detained and treated in any such hospital, pursuant to the provisions of an Act approved May 12th, 1931, Laws 1931, page 221, entitled 'An Act to Provide Partial Support for Counties or Cities Maintaining Approved Hospitals for the Insane;' Provided, that the State Auditor shall not audit, and the State Treasurer shall not pay any claim out of this appropriation unless such claim has first been approved by the President of the Board of Managers of State Eleemosynary Institutions."

It is our opinion that the above section refers solely to the four state hospitals and to the Sanatorium at Mount Vernon, and in reality has no bearing on the question contained in your letter, as Section 1 of H.B. 541 refers solely to the Act of 1931 (Laws of Mo. 1931, p. 221). We think the sole question to be here determined is whether or not under the Act of 1931, permitting counties or cities having a hospital for the insane to be paid $8.00 per month per patient, the same includes institutions for the feeble-minded.

You refer to the institution in question as the Training School for Feeble-minded operated by the City of St. Louis. Whether said institution is an insane asylum or an institution for the feeble-minded is a question of fact, the character and type of patients treated, and not the name of the institution, being determinative; however, for the purposes of this opinion, we shall treat the institution in question as an institution for the treatment of feeble-minded persons.

Regarding the Training School for Feeble-minded at Marshall, Missouri, this institution was declared to be a state eleemosynary institution by Sec. 8560, R.S. Mo. 1929, which provides:

> "The state hospital No. 1, at Fulton, the state hospital No. 2, at St. Joseph, the state hospital No. 3, at Nevada, the state hospital No. 4, at Farmington, the Missouri State Sanatorium, at Mount Vernon, and the Missouri State School, at Marshall, are hereby declared to be state eleemosynary institutions of the State of Missouri within the meaning of the provisions of this article."

The above section refers to the institution at Marshall as the "Missouri State School at Marshall", but we know as a matter of fact that none are admitted to the institution except feeble-minded persons. Section 8691, R.S. Mo. 1929 provides:

> "There shall be established in this state a colony for feeble-minded and epileptics, to be known as the Missouri State School."

We therefore come to the conclusion that the institution for the feeble-minded in the City of St. Louis is identical in its purpose to the Missouri State School at Marshall. However Section 1 of the Act of 1931, supra, confines the payment of the $8.00 per month per patient to the care, detention and treatment of the <u>insane</u> - the Act is wholly silent as to feeble-minded persons.

Webster's New International Dictionary defines the word "insane" as follows:

> "unsound - said of the mind; exhibiting unsoundness or disorder of the mind; not sane; mad; deranged in mind; distracting; used by or appropriated to insane persons as in insane hospital; * * "

Section 8664,R.S. Mo. 1929 construes the word "insane" to be:

> "The words 'insane' and 'lunatic', as used in this chapter, shall be construed as including every species of insanity or mental derangement. * * * * "

Webster's New International Dictionary defines "feeble-minded" as follows:

> "Weak in will or understanding; having mental infirmity; wanting firmness or constancy, irresolute; vacillating; 'comfort the feeble-minded', 1 Thess., v. 14; having a mind incapable of normal development, although of better intelligence than imbeciles and idiots."

CONCLUSION

There is a broad distinction between the words "insane" and "feeble-minded" and one does not include the other. As stated in Section 8664, supra, "insanity" contemplates a mental derangement, while feeble-minded persons are persons of weak will and understanding, although not idiots or imbeciles. Therefore, it is the opinion of this department that the claim filed by the Training School for Feeble-minded operated by the City of St. Louis cannot be legally allowed by the Board of Eleemosynary Institutions and audited by you as Auditor of the State of Missouri.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

OLD AGE PENSION - Accrued assistance due an old age pensioner at the time of his death, to whom paid.

April 21, 1936.

4-7

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office, which reads as follows:

> "I would be glad if you would give me an opinion on the following questions:
>
> 'If a person receiving Old Age Assistance dies and there is no administration upon his estate within sixty days after his death, to whom will the accrued assistance be paid?
>
> 'What person or persons will determine who is to receive this accrued assistance?' "

In an opinion given to Miss Reba Choate, Assistant Commissioner of Old Age Assistance under date of February 4, 1936, we ruled that accrued assistance due a pensioner at the time of his death was a part of his estate and should be administered upon in the same manner as any other property of the deceased.

Chapter I, R. S. Mo. 1929 provides a complete and exclusive scheme for the administration of estates of deceased persons. In our opinion, the law contemplates that all estates of deceased persons be administered upon under the provisions of this chapter and under the direction and supervision of the Probate Court.

Section 10, p. 998 of 23 C. J. provides in part as follows:

> "As a general rule all estates of decedents are subject to administration, as the policy and intent of the statutes on the subject clearly contemplate that property of decedents left undisposed of at death shall, for the purpose of collecting the same, ascertaining and protecting the rights of creditors and heirs, and properly transmitting the title of record, be subjected to the process of administration in the probate court, and indeed there is no other method provided by statute whereby the existence of creditors or heirs of decedent may be conclusively established and the estate distributed."

Section 11, p. 999 of the same volume reads in part as follows:

> "Administration is usually a necessity where a person dies leaving unpaid debts and property which may be made available to pay them, and the mere fact that there may be debts has been considered sufficient to render administration proper. * * "

Section 13, p. 1000 of the same volume, reads as follows:

> "While the power to grant administration is not restricted to cases in which the estate is indebted, the absence of debts may render administration unnecessary, it being considered that in such case the heirs may properly take possession of the assets and make a division among themselves in kind or otherwise by mutual agreement."

The rule that the heirs of a decedent may distribute among themselves his personal property without the appointment of an administrator, which is an exception to the rule that title to personalty left by an intestate rests in his administrator, is applicable only when three things occur: First, the absence of debts against the estate; Second, the legal age of the heirs entitled to share in the distribution; and Third, a unanimity among them as expressed by their agreement or act to dispense with an administrator. Griesel vs. Jones, 123 Mo. App. 45.

Section 7, R. S. Mo. 1929 provides what persons are entitled to priority in administering an estate. Said section reads as follows:

> "Letters of administration shall be granted: First, to the husband or wife; secondly, to those who are entitled to distribution of the estate, or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate: Provided, however, if the court, or judge in vacation, should believe no one of such persons entitled to administer is a competent and suitable person, some other person than those above mentioned may be appointed."

Section 8, R. S. Mo. 1929 provides that if such persons entitled to priority in administering an estate fail to apply within thirty days, that the court or judge or clerk may issue citation to him or them upon motion of any interested person to appear and qualify for administration, and if the person or persons so cited fail to administer within the time appointed, letters may be granted to any person whom the court or judge or clerk in vacation may deem must suitable. Said section reads as follows:

> "If no such person apply for letters within thirty days after the death of the deceased,

> the court or judge or clerk may issue citation to him or them, on motion of any person interested, to appear and qualify for administration, giving at least five days' time for that purpose; and if the person or persons so cited fail to administer within the time appointed, letters may be granted to any person whom the court or judge or clerk in vacation may deem most suitable.

Under the provisions of Section 107, Laws Mo. 1933, p. 164, the widow or widower is entitled, in addition to dower, to certain articles of property and such sums of money in exclusion of all debts claimed, charges, legacies and bequests as the court may deem reasonable for the proper support of said widow or widower and minor children under the age of eighteen years, if any, for the period of one year after the death of the decedent. In addition thereto, the widow or widower is allowed personal property not to exceed the appraised value of four hundred dollars under the provisions of Section 108, R. S.Mo. 1929, and under the provisions of Section 110 if the widow or widower does not receive the property thus allowed, the court shall order the money to be paid to the widow or widower.

Under the provisions of Section 2, R. S. Mo. 1929 the Probate Court may refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widow, widower or minor children under the age of eighteen years, and if he orders that no letters of administration shall be issued on such estate, such widow, widower or minor children are authorized to collect, sue for andretain all the property belonging to such estate. Section 2 provides as follows:

> "The probate court, or the judge thereof in vacation, in its or his discretion, may refuse to grant letters of administration on estates of deceased persons not greater in amount than is allowed by law as the absolute property of the widower,

> widow or minor children under the age of eighteen years. Proof may be allowed by or on behalf of such widower, widow or minor children before the probate court or judge thereof of the value and nature of such estate, and if such court or judge shall be satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, he or it shall order that no letters of administration shall be issued on such estate, unless, on the application of creditors or other parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow or minor children shall be authorized to collect, sue for and retain all the property belonging to such estate; if a widower or widow, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of eighteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suits."

Section 296, R. S. Mo. 1929 provides for the election of a public administrator who is ex-officio public guardian and curator in and for his county.

Section 299, R. S. Mo. 1929 provides when a public administrator is to take charge of an estate. Section 299 reads as follows:

> "It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and

> estate of all insane persons in his county, in the following cases: First, when a stranger dies intestate in the county without relations, or dies leaving a will, and the executor named is absent, or fails to qualify; second, when persons die intestate without any known heirs; third, when persons unknown die or are found dead in the county; fourth, when money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same; fifth, when any estate of any person who dies intestate therein, or elsewhere, is left in the county liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heirs in this state; sixth, the persons of all minors under the age of fourteen years, whose parents are dead, and who have no legal guardian; seventh, the estates of all minors whose parents are dead, or, if living, refuse or neglect to qualify as curator, or, having qualified, have been removed, or are, from any cause, incompetent to act as such curator, and who have no one authorized by law to take care of and manage their estate; eighth, the estates or person and estate of all insane persons in his county who have no legal guardian, and no one competent to take charge of such estate, or to act as such guardian, can be found, or is known to the court having jurisdiction, who will qualify; ninth, where from any other good cause, said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost."

Section 303, R. S. Mo. 1929 makes it the duty of all civil officers to inform public administrators of all property and estates known to them which are liable to waste, loss or injury, which by law ought to be in the possession of a public administrator. Said section reads as follows:

> "It shall be the duty of all civil officers to inform the public administrator of all property and estate known to them which is liable to loss, waste or injury, and which by law ought to be in the possession of the public administrator."

Section 24 of the Old Age Assistance Act provides in part as follows:

> " * and in case any applicant shall die, having any accrued or unpaid assistance, the amount thereof shall be paid to the legal representative of such applicant; but if there be no administration upon the estate of the deceased applicant within a period of 60 days after his death, then the amount due shall be paid to whomsoever would be entitled thereto under the laws of this State and the provisions of this Act; * * "

As pointed out above, however, an estate of a deceased does not vest in his heirs or in his creditors, but in an administrator appointed by the court, unless the court orders that no letters of administration be granted when the estate of the deceased is not greater than the amount of the absolute property allowed a widow or widower, in which case the property would vest in such widow or widower.

CONCLUSION.

In view of all of the above, it is the opinion of this department that accrued assistance due an old age pensioner at the time of his death should be paid to the person to whom the Probate Court has granted letters of administration, or to the Public Administrator, when it is his duty to administer the estate, or, if the value of

the estate is not more than is allowed the widow, widower or minor children as their absolute property, and the court make an order that no letters of administration shall be issued, then the accrued assistance should be paid to such widow, widower or minor children. The only exception to the above is where there are no debts against the estate and the heirs entitled to share in the distribution are all of age and agree among themselves to dispense with an administration, in which case the accrued assistance should be paid direct to the heirs.

We respectfully suggest that in case an old age pensioner die having accrued assistance due him, that the Probate Court of such county wherein the pensioner resided be notified, so that if the persons entitled to administer the estate do not appear within thirty days, he may cite them to appear and qualify for administration, and if they do not do so, appoint some other competent person to administer the estate. We also suggest that the Public Administrator of the county in which the deceased resided at the time of his death, should be notified, so if it is his duty under the law to administer upon the estate, he may proceed to do so.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:FE

PROSECUTING ATTORNEYS: Prosecuting attorney allowed reimbursement for necessary stenographic and clerical help from County, in reasonable and necessary amounts.

April 24, 1936.

4-28

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge receipt of your letter in which you request the opinion of this Department. Your letter is as follows:

> "In the course of our audits of county officials we find that in several cases the Prosecuting Attorney has been allowed deputies or assistance of clerical hire, the salaries of which have been paid out of the county revenue upon warrants issued by the County Courts.
>
> "We are unable to find any statutes authorizing this expenditure of county money.
>
> "I would like an opinion from your office as to whether a County Court can legally pay clerical help or deputy hire of the Prosecuting Attorney."

Your question is, May a county court legally pay clerical help or deputy hire of the prosecuting attorney? We shall assume, in your inquiry you have reference to those counties in which there is no specific statutory authority for deputies or stenographers and wherein a stated salary is not allowed by statute for such deputies and stenographers.

At the outset we wish to state that the courts of this State have adopted a liberal policy in paying the necessary expenses of public officers, to the end that they be not required to pay out of their own pockets such expenses of such offices in performing their public duties .

The prosecuting attorney has many and complex duties to perform, being the chief law enforcement officer of the county and also the legal advisor of the county court and the public officers of the county relative to public business and to attend to all legal matters in which the county is involved, all of which necessitates the drafting of complaints, informations, indictments, petitions and other court papers and contracts.

A stenographer, no doubt, is the clerical help referred to in your letter. A stenographer in recent years has become a necessary adjunct to a law office and the public business may be expedited and dispatched more quickly by the use of stenographic help in an office.

The courts in Missouri have adopted a strict rule as to the payment of salaries , fees or compensation to public officers and the officer must put his finger upon the statute authorizing the payment of same. The courts have adopted the common law rule, that is, that an officer is presumed to render his services gratuitously unless there is specific statutory authority for the payment of same. King v. Riverland Levee District, 279 S. W. 195, 196.

With reference to the payment of expenses paid out or necessarily incurred by the officer in the performance of his official duties, we find that the courts have adopted a more liberal rule and permit the officer to be reimbursed for necessary outlays for expenses out of the public treasury. The courts have correctly adopted this rule for if an officer were compelled to pay the expenses of the operation of his office and other expenses out of his salary or fees, the public business to some extent would be neglected. There have been several cases in our appellate courts relative to the expenses and the purchasing of equipment necessary in the operation of public offices. In each case we have found that the courts have adopted this liberal policy and made the payment of certain expenses a charge against the public treasury, although no specific statutory authority could be found for same.

In the case of Saylor v. Nodaway County, 159 Mo. 520, under a statute providing that the necessary expenses incurred by the probate court "for books, stationery, furniture, fuel and other necessaries shall be paid by the county," the court held that the county court was compelled to pay the probate judge for postage stamps used in the discharge of his official duties.

In the case of Ewing v. Vernon County, 216 Mo. 681, l. c. 692, involving what the recorder may have for equipment and expenses, the court said:

> "There is not a word in the chapter relating to providing chairs, desks, pens, ink, stationery, stoves, racks, tables, spittoons or other office paraphernalia. There is even no word relating to a room in which to keep his office or fuel to heat it, but when we read other provisions of the general statutes relating to building a court house and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish."

In the companion case of Ewing v. Vernon County, 216 Mo. 696, the court held that the sheriff's office is entitled to janitor service at the expense of the county and it is the duty of the county court to reimburse the sheriff for reasonable outlays for such services.

In Buchanan v. Ralls County, 283 Mo. 10; 222 S. W. 1002, the Supreme Court held that it was the duty of the county to furnish the county treasurer with suitable office space, heat, lights and janitor service.

In 46 Corpus Juris, p. 1018, it is said:

> "But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done."

In all of these cases the statutes have not been explicit as to what should be furnished each county official in the way of equipment and expenses, yet the courts have adopted liberal views in the interest of efficiency of the offices and the officers in the performance of their public duties.

In this day business is transacted by modern means and in modern ways, and we can see no good reason why public business should not be conducted in the same way and in keeping with the times. It is almost universal that all of the legal papers mentioned above are prepared on the typewriter and the typewriter is essential in the present day office, and a typewriter without an operator is useless. It is not one of the qualifications of a prosecuting attorney that he be a stenographer or typist.

It is our opinion that a deputy or an assistant in the office of a prosecuting attorney is not entitled to a salary payable out of the county treasury in the absence of statutory authority therefor. However, it is our opinion that if it is necessary for the prosecuting attorney to hire a stenographer or other clerical assistance to perform certain necessary duties in his office, and he thereby is compelled to pay such expenses out of his pocket, he is entitled to reimbursement from the county in reasonable and necessary amounts.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

CRH:EG

SUPERINTENDENT OF SCHOOLS,COUNTY: Expenses for telephone of County Superintendent of Schools not payable out of funds under Section 9475

SCHOOLS.

April 29, 1936 4-30

FILED 83

Honorable Forrest Smith
State Auditor
Jefferson City,Missouri

Dear Sir:

This is to acknowledge receipt of your letter of April 16, in which you inclose a request for an opinion to you from the Superintendent of Schools of Stone County, Missouri. His letter is as follows:

> "I have no telephone in my office and the county is not able to supply me with one, do you think it would be all right if I used some of the money in the certificate funds or county association funds as some call it to pay the telephone bill.
>
> "This would be a benefit for the teachers to be able to call me, as I think it would be all right. What is your opinion?
>
> "Is there any other counties that are doing this?
>
> "Please let me hear what you think of this."

The question is, whether or not the Superintendent of Schools of Stone County may pay for a telephone for his office out of the certificate funds or county association funds. The funds mentioned in the latter are received under the provisions of Section 9475, Revised Statutes Missouri, 1929, which provides, in part, as follows:

> "Every applicant for a certificate shall pay to the county superintendent of public schools a fee of three dollars which shall entitle him to take any and all examinations given in any calendar year. Every applicant for a renewal of his certificate shall pay a fee of one dollar and fifty cents. The fees so collected shall be used for the payment of the expenses of teachers association and teachers' meetings authorized by this chapter - at least thirty per cent. being set apart and used for this purpose- and for the expenses incident to the grading of papers and issuing certificates of applicants for license to teach. The county superintendent of public schools shall remit to the state superintendent five cents for each subject written by each applicant, whose papers are sent to the state superintendent of schools. * * * * * * * "

Said section further provides that the fees thus received by the State Superintendent of Schools may be used by him to pay assistants for examining and grading such papers and other expenses in connection therewith, and further provides that the balance shall be turned into the General Revanue Fund of the State by the State Superintendent of Schools, and said section further provides:

> "The county superintendent of public schools shall make report of all faes collected, all amounts expended for teachers associations and meetings and for all amounts remitted to the state superintendent to the county court at its regular meeting in February of each year."

We do not find under this section that this fund may be used to provide a telephone for the county superintendent of schools, but said section states definitely and specifically for what purposes such fund may be used.

It is, therefore, our opinion that the County Superintendent of Schools is not allowed to use the funds received under the provisions of Section 9475 for the purpose of supplying a telephone for his office.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

CRH:LC

CRIMINAL COSTS: When defendant is insolvent and continuance is granted at his instance and defendant is later acquitted, the State is liable for costs; when state receives continuance at its cost and defendant is convicted and unable to pay costs, State is only liable for costs incurred by it.

April 30, 1936. 5-14

FILED
83

Honorable Forrest Smith,
State Auditor,
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your letter of April 16, wherein you make the following request for an opinion:

> "Re: State v. Jason Arnett
> and John Landers.
>
> Witnesses in the above entitled case having been duly subpoenaed by a sheriff appear in the Circuit Court in obedience to said subpoena and at that term of court an application is filed on behalf of the defendants for a continuance. A continuance is granted by the court upon the application and at the request of the defendants to the next term of court, the court failing to enter any judgment in regard to the cost of the continuance. At the next term of Circuit Court the defendants are tried, convicted and sentenced to the penitentiary. The Clerk makes out a cost bill for the costs in the case, including all costs incurred on behalf of the State at the term in which the continuance was granted upon the application of the defendant. The cost bill includes the affidavit and certificate of the Judge and Prosecuting Attorney that the defendants are insolvent and unable to pay the costs in the case.
>
> This office desires an opinion as to whether or not the State is liable for the costs incurred on behalf of the State at the term when the case was continued upon the application of the defendant."

The facts as contained in your letter were submitted to this department on January 13, 1936, and in the opinion rendered to you on January 17, it was held that a defendant is liable for the costs in a case wherein a continuance is had at his request, regardless of the fact that he was later acquitted of the charge. This opinion was rendered in accordance with the decision in the case of State ex rel. v. Gordon, 254 Mo. 471.

Your request now involves the further question as to who is liable for the costs when the defendant is insolvent. This point has never been directly passed upon by the courts of this state. Doubtless, in the past you have paid all the costs in a continuance had at the instance of the defendant when said defendant was insolvent under the provisions of Section 3826, R.S.Mo. 1929, wherein it states: "* * * and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Assuming that the court granted the continuance in conformity with Section 3653, R.S. Mo. 1929, which provides:

> "Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise direct,"

and that the court directed the defendant should pay the costs, we deem the same to be final judgment for costs. However, it is possible that it is separate and distinct from the rest of the costs, regardless of the outcome of the case, as was stated in the case of State ex rel. v. Gordon, 254 Mo. l.c. 474, but if the defendant is insolvent, who pays the costs - are they lost to everyone entitled to the same?

The decision in the Gordon Case infers that Section 3653, supra, is wholly independent of the general sections, now Sections 3826, 3827 and 3828, when it uses this language: "The taxation of costs when the cause is continued upon the application of either party, and in that sense provides an exception or special rule concerning the costs therein mentioned. The other sections are announcements more in the nature of a general rule for the taxation of costs when the defendant is convicted and do not undertake to retax costs that have been previously adjudged."

The defendant is liable for costs for continuance taken at the adjourned term. State v. Butler, 118 Mo. App. l.c. 590.

In the case of State ex rel. v. Carpenter, 51 Mo. 555, a decision relating to the liability of the county for costs, in which it was contended that the county was only liable for costs subsequent to the plea of guilty by defendant, the State being liable for the costs prior to the plea of guilty, theCourt, in referring to the insolvency of a defendant, said (l.c. 555-556):

> "Strickland being insolvent, the judge and Circuit Attorney examined and certified the bill of costs, which had accrued in the case, to be paid by the county. The County Court ordered the payment of all the costs which were made subsequent to the plea of guilty by the prisoner, and refused the payment of the costs which accrued previous thereto. The relator then applied for a mandamus to compel payment which the court awarded, and the defendant appealed.
>
> "It is now insisted that all the costs of the proceeding which were made prior to the time the prisoner pleaded guilty and was sentenced to a fine and imprisonment in the county jail, were properly chargeable to the State, and not to the county.
>
> "The statute in relation to criminal costs, provides, that they shall be paid by the State in all capital cases in which the defendant shall be convicted, and shall be unable to pay them; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. And the county in which the indictment is found, shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them.
>
> "Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is

> true the jury brought in a verdict in favor of punishing him by imprisonment in the penitentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence."

A decision which by anology we believe could be made applicable to the instant case is that of State v. Parker, 63 Mo. App. l.c. 537, wherein the Court said:

> "It is provided by section 4180, Revised Statutes, 1889, relating to criminal procedure: 'Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such cause for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise directs.' In our opinion, that section is sufficient statutory authority for the rendition of a judgment for costs against a defendant in a criminal case. Sections 4265 and 4395 provide that, upon the conviction of a defendant, he shall be adjudged to pay the costs, and that it shall be the duty of the clerk of the court, at the end of each term, to issue executions for the costs of conviction. It is true that neither of these sections refer in terms to the costs of a continuance, but from that fact we are not authorized to assume the legislature did not intend that an execution should issue on a judgment for costs arising on a continuance. A fair and reasonable construction of section 4180 is that the Legislature, by authorizing a continuance at the costs of defendant, meant that there should be a judgment rendered against him and necessarily an execution upon such judgment."

Bearing in mind that the original premise was to the effect that the costs of a continuance were independent of the final outcome of the case, yet by the same argument and logic as used in the Parker Case, in our opinion, the statutes relating to when the state and county shall pay the costs, i.e., Sections 3828,3827 and 3826, are applicable to the instant point.

A case in which the facts are almost identical with the instant case is that of State ex rel. Spurlock v. Holladay, 67 Mo. 299. The writ in this case was denied for the reason that the defendant was not charged with a crime for which a term in the penitentiary was the sole punishment. The court does not determine the question as to whether the State Auditor would have been compelled to audit the costs for the continuance if the crime charged had been punishable solely by imprisonment in the penitentiary.

CONCLUSION

When a continuance is granted a defendant at his cost, it may be true that this constitutes a judgment for the cost of the continuance for which the defendant is liable, irrespective of the final outcome of the case, yet if the defendant be insolvent and unable to pay, are the officers, witnesses, and others to lose their costs? We think not.

Although the Legislature has not dealt specifically with this question, nor have the decisions of the Supreme Court related directly to the same, it is the opinion of this department that Sections 3826, 3827 and 3828, R.S. Mo. 1929 are to be read in conjunction with Section 3653. Therefore, when a continuance is granted at the instance of a defendant, and the defendant is later acquitted, the State is liable for all of the costs of the continuance when the defendant is insolvent; when the State receives a continuance at its cost and the defendant is later convicted and is unable to pay the costs, we think the State is liable only for the costs incurred by it.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

OWN:AH

TAXATION:
COUNTIES: Property owned by a county located in another county is exempt from taxation

May 11, 1936

5-17

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

> "We have been requested to ask your opinion upon the following question.
>
> "Several years ago a depository bondsman in Audrain County deeded his farm to that County, this farm being located in Clark County. Since the title of the farm is vested in Audrain County is it exempt from taxation or should the county officersof Clark County extend and collect taxes upon this property? "

Section 6, Article X, of the Constitution of Missouri provides, in part:

> "The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempted from taxation. * * * * * * * * *"

Section 9743, Revised Statutes Missouri 1929, reads, in part, as follows:

> "The following subjects are exempt from taxation:
>
> * * * * * * * * * * * * * * *
>
> "fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; * * * * "

The above constitutional and statutory provisions specifically exempt the property both real and personal, of counties, from taxation. The above provisions do not provide that property belonging to a county, in order to be exempt from taxation, must be located in the county owning the property.

61 Corpus Juris, section 453, page 419, reads as follows:

> "And a statutory provision exempting from taxation property belonging to a county has been held to exempt county lands located in another county of the state. * * * * * * * "

In the case of Warren County v. Nall 29 So. (Miss) 755, l. c. 758, the Court said:

> "We do not think that the excision of the lands involved in this suit from

> Warren county and placing it in Issaquena county in any way affected the rights of Warren county. The sale of the lands for taxes by the tax collector of Issaquena county was void. The land belonging to the county was exempt from taxation, whether situate within or without the limits of the county owning the same. Code 1880, sec.468. The words of said section declaring that the 'property, real or personal, belonging to the United States, or this state, or to any county or incorporated city or town within the same,' etc., shall be exempt from taxation, includes the lands of a county located in another county of the state. The terms 'within the same,' in the phrase above quoted, relate to the location of the county, city, or town, and not to that of the property. This meaning is brought out perhaps more distinctly in the Code of 1892, sec.3744, par.'c', which exempts from taxation 'all property, real or personal, belonging to this state, or any county or municipal corporation thereof,' but the exemption is as broad under the one Code as the other."

We do not pass upon the right of a county to acquire land in another county as outlined in your letter.

In view of the above, however, it is our opinion that property belonging to a county which is located in another county is exempt from taxation under the provisions of Section 6, Article X, of the Constitution of

Missouri, and Section 9743, Revised Statutes Missouri 1929.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

SCHOOLS: A school district may lawfully enter into a contract with another district to transport its pupils and pay the difference between what the State actually pays and the amount stated in Section 16a, Laws Mo. 1935, p. 352.

May 27, 1936.

FILED
83

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Slankard:

This is to acknowledge your letter as follows:

"I would like to have your opinion on the following:

"The Board of Directors of a school district that does not maintain an approved high school pays for the transportation of high school pupils residing within the district to an approved high school in another district. The amount they pay is the difference between the maximum of $3.00 provided for in Sec. 16A, pg. 352, Laws of Missouri 1935 and the amount which the state actually pays on the $3.00.

"In other words, the district in which the improved high school is located collects from the state for this transportation and then charges the district from which the pupils come, the difference between the amount actually paid by the state and the $3.00 maximum making a total of $3.00 provided for in the statute.

"The Board of Directors from the district in which the pupils reside pays this money out of the teacher's fund. Does the Board of Directors of the district in which the pupils reside have the power, and is it

legal for them to pay for this transportation."

Section 16a, Laws of Missouri, 1935, page 352, relates to the transportation of pupils. A reading of such shows that the State grants an aid to the schools transporting pupils. You will note that said section divides itself into three classifications, namely: (1) Transporting of pupils to a central school, or schools, within the district; (2) transporting pupils to adjoining high schools by resident school district; (3) transporting non-resident pupils by a high school that admits such.

Said section reads as follows:

"When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state superintendent of schools the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state superintendent of schools, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of

> such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits non-resident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state superintendent of schools before the transportation is begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils."

There is nothing mandatory, in the above section, on school districts to transport pupils, it being purely discretionary with the board of directors, and if said board makes provision for transporting of pupils the district receives a special aid from the State. The aid thus received from the State is separate and apart from other aids and used solely to pay for transportation. The special aid will not be paid by the State if moneys apportioned to such district "from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils." Thus making the cost of transporting being borne solely from the special aid and moneys derived from taxation.

While Section 16a provides for three classifications, yet, state aid will only be paid to the one district. Thus, if the board of directors of the school district (mentioned in your letter) enters into an agreement with the receiving high school for the transporting of said district's pupils, and the receiving high school agrees to transport, state aid

can only be paid to the high school and not to both districts, even though both make provisions for transporting. We do not find any specific statutory authority authorizing the paying of the difference the state fails to pay, if any, by the sending school district to the receiving high school. Neither do we find any statute or case that prohibits the paying of the difference, if any, by the sending school district. Absent such statute or case, we conclude that the district of residence would have the right to enter into an agreement with the receiving high school in order to pay the difference between what the statute provides what the State shall pay and what the State actually pays.

We conclude, that in order to have its pupils transported the district of residence could obligate itself by a contract with the receiving high school to pay the transporting high school the difference what the State fails to pay of its stated $3.00 per pupil transported, and would in our opinion be legal and within the powers of the resident board of directors. However, the board of directors cannot pay the difference out of its teachers' fund, in view of Section 9311, R. S. Mo. 1929, which in part provides as follows:

> "The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for the teachers' wages on the teachers' fund; all moneys used in the purchase of a site, erection of a building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund; "

It is our further opinion that the payment of the difference by the resident school district would have to be out of the incidental fund; the incidental fund being derived

from taxation.

See, also, Sections 9312 and 9233, R. S. Mo. 1929; State ex rel. to use of Gastineau v. Smith, 196 S. W. 115.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

INHERITANCE TAX: An inheritance tax may be assessed even though the property be subject to escheat.

June 11, 1936

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your oral request for an opinion relative to the question of whether or not an inheritance tax should be assessed in cases where property is subject to escheat.

Section 621, R. S. Mo. 1929 provides:

"Within one year after the final settlement of any executor or administrator, assignee, sheriff or receiver, all moneys in his hands unpaid or unclaimed, as provided in section 620, shall, upon the order of the court in which such settlement is made, be paid into the state treasury. And the state treasurer shall issue to him a duplicate receipt therefor, one of which shall be filed with the state auditor, who shall credit him with the amount thereof and charge the state treasurer therewith. All such moneys so received into the state treasury shall be credited into a fund, to be known and designated as 'escheats.' "

Under this section of our law, it is our understanding that the sum of $2,685.92 was paid the State Treasurer in the estate of Adolf Schutze, no inheritance tax being assessed against such sum.

It is our opinion that an inheritance tax should have been assessed in the first instance by the Probate Court.

Our position is sustained by the case of the Matter of Lind, 132 App. Div. 321; 117 Supp. 49; aff. 196 N. Y. 570; 90 N. E. 1161, wherein the court said:

> " *** Upon the death of the decedent his personal property vested in the administrator, and his next of kin were entitled to the property upon proving their relationship to the deceased. No such person has appeared and no such person has been found to be in existence. There has been no transfer 'dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged. Matter of Vanderbilt, 172 N. Y. 69; 64 N. E. 782, had relation to a trust estate in which the ultimate beneficiaries were uncertain, and what is said in that case relates to such an estate. The only uncertainty as to the ownership of this property depends upon the fact as to whether the deceased left next of kin. The presumption is that the deceased left next of kin, but there is no presumption that he left a widow or descendants. It is presumed, therefore, that the property vested in the next of kin of the deceased, and is therefore taxable under section 200 of the Tax Law, and as it does not appear that it is exempt under section 211 of the Tax Law, the tax imposed by subdivision 6 (now subd.7) of section 220 applies, and it is taxable at the rate of 5%."

However, in this instance, no inheritance tax having been assessed, the question arises as to whether or not the State Auditor should issue his warrant for the amount of tax now assessed by the Probate Court

Section 624, R. S. Mo. 1929 provides:

> "The court shall examine the said claim, and the allegations and proofs, and if it find that such person is entitled to any money so paid into the state treasury it shall order the state auditor to issue his warrant on the state treasurer for the amount of said claim,

but without interest or costs; a copy of which order, under seal of the court, shall be a sufficient voucher for issuing such warrant."

In this case, the Probate Court has ordered the State Auditor to issue his warrant on the State Treasurer for the sum of $152.75 as inheritance tax in this estate plus the sum of $3.36 as fees to the said court, plus the further sum of $24.76 as additional costs.

In view of this order of the court, it is our opinion that you may properly issue your warrant for the amount of the tax, plus the fee of the court, but that you should not issue your warrant for $24.76 as costs, inasmuch as Section 624 specifically prohibits the issuance of a warrant for costs.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

CITIES OF THE FOURTH CLASS: Collector elected to fill vacancy holds office for full period of vacancy.

June 15, 1936

6-16

FILED 83

Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

We acknowledge your request for an opinion dated June 10th, which reads as follows:

> "Wish you would please let me have your opinion on the following:
>
> "The City of Neosho is a city of the fourth class. At the regular city election held on the first Tuesday of April, 1936 a City Collector was elected. Approximately two months after he was elected and qualified he died. A special election was called and proper notice given and a new collector was elected. What will be the length of his term.
>
> "In other words, will he hold office until the next city election at which time City Collector is to be elected, or will he hold his office until the April election 1937 at which time the aldermen are elected."

Section 6949 R. S. Mo. 1929, provided in part:

> "A general election for the elective officers of each city of the fourth class shall be held on the first Tuesday in April next after the organization of such city under the provisions of this article, and every two years thereafter; * * * *."

Section 6951 R. S. Mo. 1929, provides in part:

> "The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor, marshal, collector and board of aldermen,* * *."

You state in your request that a special election was held according to the provisions of Section 6973, R. S. Mo. 1929, which reads as follows:

> "If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city: Provided, that when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment: Provided further, that any vacancy in the office of aldermen which may occur within said six months preceding a general municipal election shall be filled in such manner as may be prescribed by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled."

Article XIV, Section 5, Missouri Constitution provides:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

CONCLUSION.

The office of Collector in cities of the fourth class is an elective office.

The term of office for collectors in cities of the fourth class is a two year term, and he continues thereafter in office until his successor be duly elected and qualified. The death of a duly elected and qualified collector causes a vacancy in that portion of the statutory term which would have been served by deceased had he lived. One duly elected at a special election, as a successor to a deceased person, to fill a vacancy under the provisions of Section 6973, supra, is entitled to serve the full period of vacancy caused by death. Such is the reasonable construction of the statutes, supra.

We are of the opinion that the collector elected to fill the vacant office, specified in your request, has the legal right to serve continuously until the general election in April, 1938, and thereafter until his successor be duly elected and qualified.

Yours very truly

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

LIQUOR CONTROL ACT:
APPROPRIATIONS:

State liquor stamps cannot be paid for out of money appropriated to the Liquor Department for general operating expenses.

June 16, 1936

6-27

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this department which reads as follows:

> "In Section 25, page 29 of the 1935 Laws, is an appropriation made to the Treasury Department for the purchase of liquor stamps. This appropriation is now exhausted and I have been advised by Mr. Becker of the Liquor Department that it will be impossible for him to collect any more revenue from liquor without the stamps.
>
> "Section 33 on page 103 under Subdivision D-Operations is an appropriation of $200,000 for the following purposes: 'General expenses consisting of communication, binding and printing, transportation of things, travel, stationery, office supplies and other general and miscellaneous expenses.' I am advised by Mr. Becker that in this appropriation he has a sufficient amount of money to pay for the printing of liquor stamps without effecting the other operations in his office. He contends that the printing of liquor stamps could be interpreted under the 'printing' in his appropriation.

> "I would like an opinion from your office as to whether I can legally pay the printing of liquor stamps out of this appropriation made to the Department of Liquor Control."

Under the provisions of Section 35 of the Liquor Control Act, Laws of Missouri Extra-Session 1933-1934, page 90, it is made the duty of the State Treasurer to provide suitable state certificates and labels for the inspection, gauging and labeling of intoxicating liquors, and, upon demand, deliver such labels to the Supervisor of Liquor Control taking his receipt therefor and charging him with the same. Said section reads as follows:

> "It shall be the duty of the State Treasurer, upon the taking effect of this act, to provide suitable and inimitable state certificates and labels for this inspection, gauging and labeling, having on each proper places for counter-signing by the State Treasurer and Supervisor of Liquor Control, and shall safely keep the same together with the plates used in making them, when not in actual use. The State Treasurer shall from time to time upon demand, deliver the aforesaid labels to the Supervisor of Liquor Control, taking therefor his receipt, and shall charge said Supervisor of Liquor Control with the same; and shall from time to time, as said Supervisor of Liquor Control makes returns of moneys collected in the course of his inspection, credit said Supervisor of Liquor Control's account with such sums, and shall keep a true and correct book account of his dealings with said Supervisor of Liquor Control."

The Fifty-eighth General Assembly, by Section 25, page 28, Laws of Missouri 1935, appropriated seventy thousand dollars ($70,000.00) for the purpose of paying salaries of the employees of the Treasury Department for services incident to the administration of the laws pertaining to the manufacture and sale of intoxicating liquor, and other expenses of the Department incident thereto, including stamps for liquor inspection, for the period ending December 31, 1936. Ten thousand dollars ($10,000.00) of said amount for the purpose of paying the salaries of bookkeepers, clerks, stenographers and temporary help, and sixty thousand dollars ($60,000.00) for stamps for liquor inspection. Said section reads:

> "There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund; the sum of Seventy Thousand Dollars ($70,000.00) for the purpose of paying salaries, wages and per diem of the officers and employees of the Treasury Department of the State for services incident to the administration of the laws of the State pertaining to the manufacture and sale of intoxicating liquors, and for other expenses of the Department incident thereto, including stamps for liquor inspection, for period ending December 31st, 1936, as follows:
>
> "Personal Service:
>
> Salaries, wages and per diem of bookkeepers, clerks, stenographers, and temporary help $10,000.00
>
> Stamps for liquor inspection . . . 60,000.00
>
> Total. . . . . $70,000.00 "

The Legislature appropriated by Section 33, page 102, Laws of Missouri 1935, four hundred six thousand dollars ($406,000.00) to the Department of the Supervisor of Liquor

to pay for the personal services, additions and operating expenses required in connection with the administration of the Liquor Control Act. Said section reads as follows:

> "There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund, the sum of Four Hundred Six Thousand Dollars ($406,000.00) to the Department of the Supervisor of Liquor Control, to pay for the personal service, additions and operating expenses required in connection with the administration of the Liquor Control Law, passed by the Fifty-Seventh General Assembly, Extra Session, as follows:
>
> "A. Personal Service:
>
> Salaries and wages of Supervisor of Liquor Control, accountants, auditors, bookkeepers, inspectors, stenographers, clerks and other necessary employees. . $200,000.00
>
> "B. Additions:
>
> Original purchase of transporting and conveying equipment, and necessary office furniture and equipment..... . 6,000.00
>
> "D. Operation:
>
> General expenses consisting of communication, binding and printing, transportation of things, travel, stationery, office supplies, and other general and miscellaneous expenses..... . 200,000.00
>
> TOTAL ..... . $406,000.00 "

No provision is made in the above section specifically providing for the purchase of stamps for liquor inspection.

Whether Sub-section (d) of the above section, which appropriates two hundred thousand dollars ($200,000.00) for general expenses, would be broad enough to include the purchase of liquor stamps by the Liquor Department, if it were not made the duty of the State Treasurer to purchase same, it is unnecessary to decide. Section 35, supra, makes it the duty of the State Treasurer to furnish to the Supervisor of Liquor Control the stamps required for inspecting and gauging intoxicating liquor and the Treasury Department was specifically appropriated sixty thousand dollars ($60,000.00) for the purpose of providing such stamps. In the face of said section and the appropriation to the State Treasurer we do not think that the Legislature could have intended that the money for the purchase of such stamps should be paid out of the fund appropriated to the Liquor Department for operation expenses.

Section 19 of Article X of the Constitution of Missouri, provides, in part:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * * "

The purpose of the above constitutional provision is expressed in 59 Corpus Juris, Section 381, pages 235 and 236, which reads:

> "The constitutions in many states provide that no money shall be paid or drawn from the state treasury or warrant drawn therefor except in pursuance of specific appropriations made by law. The object of such a provision is to prevent the expenditure of the people's funds without their own consent, expressed either by themselves in the state constitution or by their representatives in legislative acts.* * * "

We think it plain from the above that the Legislature,

by making it the duty of the State Treasurer to furnish liquor stamps to the Supervisor of Liquor Control and by appropriating money to his Department for this purpose, did not intend that the money appropriated to the Department of Liquor Control for general operating expenses should be used to pay for the purchase of stamps to be used for liquor inspection.

It is, therefore, the opinion of this Department that the state liquor stamps cannot be paid for out of the money appropriated to the Department of Liquor Control for operation expenses.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK,
Attorney General

JET:LC

CITIES:) Cities of third class cannot pass sales tax act
SALES TAX:) by ordinance. Cities of third class can enact ordinance placing license for occupation tax on businesses, according to the volume of business carried on.

July 15, 1936.

n-15

FILED
83

Honorable R. P. Smith
City Attorney
Cape Girardeau, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion which reads as follows:

> "I would appreciate receiving the opinion of your office as to the power of a City of the Third Class (Alternative Form) levying a sales tax. I have found no specific authority for such a tax, but neither have I found such specific authority for a gasoline tax which has been levied and collected by a number of cities, some of them of the class designated above.
>
> "Also, if it be impossible to levy such a tax as a TAX, would it, in the opinion of your office, be legal to fix the amount of the license or occupation tax at a percent of the gross business done by the licensee?
>
> "The administration which has just assumed office in this city is faced with a serious financial problem and is seeking new sources of revenue. We are informed by local business men who have travelled in other states, that municipalities, particularly in New York, levy and collect such a tax. This has led to the inquiry. Any information which your office can supply in this regard will be appreciated."

Enclosed is a copy of an official opinion rendered by Honorable Wm. Orr Sawyers, Assistant Attorney-General, on May 8, 1935, to Honorable Mark W. Wilson, Prosecuting Attorney, Clinton, Missouri, holding a village can impose occupational tax on dealers for privilege of selling gasoline.

It is the opinion of this department that the holding in the enclosed opinion is applicable to a city of the third class (alternative form of government) by virtue of Section 6840, as amended, Laws of 1931, page 276, which reads in part as follows:

> "The council shall have power and authority to levy and collect license tax on wholesale houses, auctioneers, architects, druggists, grocers, banks, brokers, wholesale merchants, merchants of all kinds, ****."

which grants such city the same power as Section 7097, R. S. Mo. 1929, referred to in the enclosed opinion.

However, we wish to call your attention to the distinction to be made in this type of a tax and a sales tax. This tax is, according to the enclosed opinion an occupational tax and definitely assessed against the merchant and to be paid by the merchant. A sales tax would be more in the nature of an excise tax and furthermore is to be paid, if following the method of payment of sales tax as enacted by the Legislature, by the people and not by the merchant. In State v. Smith, 90 S. W. (2d) 405, Judge Leedy, in speaking for the Court held the sales tax to be an excise tax. From the foregoing, Section 6840, supra, would not be applicable for a municipality to enact a sales tax, in that it would not be regulating, licensing or taxing a merchant, but in reality would be a tax on the purchaser, for which we are unable to find any such authority granted the law makers of a city of this kind. In Siemens v. Shreeve, 296 S. W. 415, l.c. 416, the Court said with regard to municipalities having the power to tax:

> "It is conceded that the license tax here sought to be imposed is an attempted exercise of the taxing power, and not a police regulation. A city has no inherent power to tax. This power rests primarily in the state and may be delegated by constitutional provision or by statutory enactment. The authority to tax must be expressly granted or necessarily incident to the powers conferred, and in case of doubt the power is denied. 7 McQuillin on Municipal Corporations (Suppl.) Section 987."

McQuillin on Municipal Corporations, Vol. 6, Sec. 2583, page 275 states:

> "One of the most essential powers of government is the right to raise revenue; no government could maintain itself without such power. The taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. This principle is universally recognized. Therefore as municipal corporations have no inherent power of taxation, consequently they possess only

> such power in respect thereto which has been granted to them b the constitution or the statutes."

In Federal State & P. V. Pass Ry. Co. v. City of Pittsburg, 226 Pa. 419; 75 Atl. 668, l. c. 663, the Court said:

> "A statement of a few rules and principles of law about which there is an can be no dispute will be helpful to a proper understanding of the questions involved in this proceeding. While taxation is an incident of sovereignty absolutely necessary to maintain government, the authority to impose taxes depends upon express legislative grant, and not upon incidental governmental power. There is no such thing as taxation by implication. The burden is always upon the taxing authority to point to the act of assembly which authorizes the imposition of the tax claimed."

Cooley on Taxation, Vol. 4, Sec. 1764, p. 3511, makes the distinction between a demand of money under police power and one made under power to tax:

> "The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If the purpose is regulation the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax."

Section 4871, R. S. Mo. Vol. 44, Corpus Juris, page 1261, provides:

> "The power to tax, inherent only in sovereignty, and belonging exclusively to the legislative department of the government, is, to the extent that it is exercised by a municipal corporation, merely a delegated power, subject to repeal and to such limitations and restrictions as may be placed upon it by constitution or statute. While the power to tax is very generally granted to municipal corporations, the power is not possessed by a municipal corporation unless it has been plainly and unmistakably granted to it either in express terms or by necessary implication. It cannot be vested

> in the city by judicial construction, or acquired by prescription, nor can a restricted power be expanded by construction."

In your letter our attention is called to the fact that Municipalities in the State of New York, as well as other states, have active sales tax laws. We wish to explain that municipalities are allowed to enact such ordinances by reason of an act passed by the State Legislature of New York, expressly providing that municipalities may enact sales tax laws.

In the laws of New York, 1934, Chapter 873, an act was passed becoming effective as of August 18, 1934, expiring December 31, 1935, title of which reads as follows:

> "AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws."

A similar act was passed upon the expiration of the 1934 Laws becoming effective April 29, 1935, and expiring July 1, 1936. However, the above Act in the State of New York, just quoted, providing that cities of a certain size may enact such an ordinance would indicate this was the only method that such an ordinance could be passed, which is no more than what we have stated. In the absence of any constitutional or statutory provision authorizing the law making body of a city to enact a sales tax law they are prohibited from so doing.

In view of the above opinion of this department holding that such a city can not legally enact a sales tax ordinance, we will now consider your second query, "would it ***be legal to fix the amount of the license or occupation tax at a percent of the gross business done by the licensee?" The enclosed opinion to Honorable Mark W. Wilson embodies this same principle with respect to the gasoline tax of one cent per gallon.

The Court in Viquesney v. Kansas City, 266 S. W. 700, held that a tax of one cent per gallon of gasoline sold in Kansas City, was legal, under Section 8702, which provides the city may license and regulate certain business. The Court further said:

> "Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is 'occupation tax' -- one form of excise tax. It

> has been applied to the volume of gasoline sold, such as the tax we have under consideration here."

We are unable to find any law prohibiting the law makers of the city from fixing the amount of license at a per cent of the gross business of the licensee. Section 6840, p. 276, Laws, 1931, provides that a municipality may license and regulate certain businesses. However, this section fails to specify the particular procedure in licensing and regulating such businesses. This is left to the discretion of law makers of such municipality. As stated in ex parte Sanford, 139 S. W. 376; 236 Mo. 660, l. c. 692:

> "It is also a well settled rule of construction, that where a statute contains grants of power, it is to be construed so as to include the authority to do all things necessary to accomplish the object of the grant." (Cases cited).

CONCLUSION.

It is the opinion of this department that a city of the third class (alternative form of government) in the State of Missouri is prohibited from passing an ordinance in the nature of a sales tax in the absence of any constitutional or statutory provision authorizing same. However, a city may legally fix the amount of a license or occupation tax at a per cent of the gross business done by the licensee.

Respectfully submitted,

OLLIVER NOLEN
Assistant Attorney-General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

ON/af

COUNTY TREASURER:) Not entitled to commission of not exceeding
) one per cent under Section 2904, R. S. 1929,
OFFICERS:) for Funding Bonds.

August 6, 1936.

8-7 FILED 83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge receipt of your letter of July 23, 1936, in which you request an opinion of this Department. Your letter is as follows:

> "Section 2904, R. S. Missouri 1929, provides for reimbursement to a Treasurer of any County, City, Town, Village or School District for brokerage fees required to be paid in the purchase or exchange of bonds, said allowance not to exceed one per cent.
>
> "In our county audits we find that a County Treasurer has used this section to obtain additional compensation for himself in handling various bond issues that have gone through his office. I would like for you to advise if this section is authority for such compensation."

It is our opinion that this section is not authority for the allowance of a fee or commission to the County Treasurer for money paid out by him in the purchase or exchange of bonds under Article 4, Chapter 15, R. S. Mo. 1929, and amendatory acts.

It will be noted that the county court or the municipal authorities, as the case might be, may allow the treasurer all sums necessarily paid by him for brokerage in the purchase or exchange of bonds. "Brokerage" has been defined as the commi sions paid to a broker for his services and as the name used to designate compensation for brokers' services. This section does not mean that the treasurer shall receive an allowance for performance of this duty unless it is first paid out by him, and then he is entitled to reimbursement only; however, limited to not exceeding one per cent upon the amount of money actually paid out by him in the purchase or exchange of bonds. The bold-faced type at the head of Section 2904, R. S. Mo. 1929, is somewhat misleading and is not supported by the body of the section.

It is, therefore, our opinion that the county treasurer mentioned in your letter is not entitled to one per cent as compensation for handling the various bond issues indicated in your letter.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

CRH:EG

WORKMEN'S COMPENSATION INSURANCE: State and other political subdivision may accept provisions of this chapter for the purpose of complying with requirements of the Resettlement Administration

10-6

September 23, 1936

FILED 83

Hon. R. C. Smith
Regional Director
Region III
342 Massachusetts Avenue
Indianapolis, Indiana

Dear Sir:

This Department is in receipt of your letter of September 3, to Honorable Guy B. Park, Governor of the State of Missouri, requesting an opinion as to the following:

"(1) May the public funds of the State and political subdivisions thereof and other local governing or public administrative bodies be used for the payment of premiums or workmen's compensation insurance or other equivalent form of insurance covering signatories of voluntary work agreements?

"(2) Are the State and its political subdivisions and other local authorities authorized by law to assume liability for injuries sustained by assigned voluntary work agreement signatories?

"(3) Will assigned voluntary work agreement signatories be otherwise similarly protected by such insurance by the operating of the provisions of any other applicable State statute?"

The statutes of the State of Missouri covering the

Workmen's Compensation Law are found in Chapter 28, Article II, Revised Statutes Missouri 1929.

Section 3303 provides, in part, as follows:

> "Sections 3300,3301 and 3302 of this chapter shall not apply to any of the following employments:
>
> "First: Employments by the state,county, municipal corporation,township,school or road, drainage, swamp and levy districts,or school board, board of education, regents, curators, managers, or control commission, board or any other political subdivisions, corporation, or quasi-corporation thereof.
>
> *
>
> "Fifth: Employments by minor employers not determined to be engaged in an occupation hazardous to employes. Any employer in this section exempted from the operation of sections 3300, 3301 and 3302 of this chapter may bring himself within the provisions of this chapter by filing with the commission notice of his election to accept the same, and by keeping posted in a conspicuous place on his premises a notice thereof to be furnished by the commission,and any employe entering the services of such employer and any employe remaining in such service thirty days after the posting of such notice shall be conclusively presumed to have elected to accept this chapter unless he shall have filed with the commission and his employer a written notice that he elects to reject this chapter."

Section 3304 defines the word "employer" as used in this chapter, as including,

> "* *(b) The state, county, municipal

corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi-corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance."

In view of these statutes, it is the opinion of this department that the State and its political subdivisions and other local authorities are authorized by law to assume the obligations contained in the Workmen's Compensation Law of the State of Missouri, and that public funds of the State and political subdivisions thereof may be used for the payment of premiums or workmen's compensation insurance, providing, of course, that the proper election has been made by law or ordinance and an appropriation made in conformity with said law or ordinance.

Of course, whether or not a State and political subdivisions thereof and other local authorities have made this election or made the required appropriation is a question of fact that would have to be determined in each particular instance.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JWH:LC

TAXATION: Bond of County Treasurers, ex-officio county collectors.
BOND: County Collectors.

November 14, 1936.

11-16

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

We are in receipt of your letter of November 7, 1936, wherein you request an opinion on the following matter:

> "This office is in receipt of several requests as to the amount of bond that the ex-officio collector of township organization counties should give. We would like to have an opinion from you in regard to this matter, as we find a conflict in the following sections:
>
> > "'Section 9886, R. S. Missouri 1929 sets out in part that any officer who is ex-officio collector of revenue shall give bond and security as such ex-officio collector to the State of Missouri to the satisfaction of the county court in a sum at least equal to the amount of all the revenue to be, by him, collector for any one year.
> >
> > "'Section 12317, R. S. Missouri 1929 sets out that county treasurers as ex-officio county collectors of counties under township organization shall be required to give bond as other county collectors under the general revenue law.'
>
> "Will you please, at your earliest convenience, advise this office which Section to follow.

Your inquiry deals solely with the matter of statutory construction and we shall therefore make an examination into these statutes and determine, if possible, which is applicable to the situation presented, to-wit, the bond required of county treasurers who are ex-officio collectors of counties operating under township organization.

Section 9885, R. S. Mo. 1929, which has since been amended on two occasions (Laws of Mo. 1933, p. 464, and Laws of Mo. 1935, p. 409), prescribes the terms of the bond required of a county collector who has been elected as provided by Section 9883, R. S. Mo. 1929. This section governs the giving of bonds by most county collectors in the State of Missouri. However, in the following section, Section 9886, R. S. Mo. 1929, one of the sections with which you are concerned in your request, reads as follows:

> "In any county where any officer thereof is ex officio collector of the revenue of said county, he shall give bond and security as such ex officio collector to the state of Missouri, to the satisfaction of the county court of such county, in a sum of at least equal to the amount of all the revenue to be by him collected for any one year, conditioned that he will faithfully and punctually collect and pay over all state and county revenue during his term as such ex officio collector, and that he will in all respects faithfully perform all the duties of collector according to the statute laws of the state governing county collectors of the revenue."

The foregoing section is general in its terms and purports to apply in any county when any officer is ex-officio collector of the county. We have traced this section back and find that it was first enacted in 1881 (Laws of Mo. 1881, p. 189). This Act is entitled "An Act to provide for the giving of bond by ex-officio collectors of county revenue." Section 1 of the Act is Section 9886, R. S. Mo. 1929. Section 2 of the Act is an emergency clause reading as follows:

> "The necessity for the proper protection of the revenue in counties wherein there are but ex-officio collectors of revenue, creates an emergency, and this Act shall take effect from and after its passage."

By virtue of this emergency clause, it is quite apparent that this section was meant and intended to apply to those officials who were at the time of its enactment ex-officio collectors of the county revenue. It is a general section in purporting to cover all such ex-officio officials. It was approved March 26, 1881.

Let us now consider Section 12317. This section is the last section of Article 11 of Chapter 86, Revised Statutes of Missouri, 1929. This article consists of only six sections, the first section providing that county treasurers of counties having adopted or which may hereafter adopt township organization shall be ex-officio collectors. The other sections deal specifically with the duties of county treasurers as ex-officio collectors. In tracing this article back, we find that these six sections are the six sections of an Act first adopted in 1881, the two amendments since that date being immaterial to this inquiry.

By turning to page 224, Laws of Mo. 1881, we find that these six sections constituted an entire act, providing that in counties organized and operating under township organization, the county treasurer should be ex-officio county collector of revenue. It therefore conclusively appears that Section 12317, supra, is a special section prescribing the bond which shall be supplied by county treasurers as ex-officio county collectors, not general in its terms applying to all ex-officio collectors as was Section 9886, supra, when first enacted in 1881. Section 12317 is by its terms identical with the original Section 6 of the Act of 1881. It therefore appears that Section 12317 is a special section applying specifically to county treasurers as ex-officio county collectors, and under well recognized rules of construction, special acts are to prevail over general acts in case of conflict, so that if a conflict exists between these sections, as applied to county treasurers who are ex-officio collectors, Section 12317 is to prevail.

However, when considering the purpose of Section 9886, supra, as originally enacted and as reflected by the emergency clause, it appears certain that it was never intended to apply to county treasurers as ex-officio county collectors. The emergency clause provides that the protection of the revenue in the counties having ex-officio collectors creates an emergency.

As county treasurers were not at that time ex-

officio county collectors, it is certain that that law was not intended to apply to county treasurers who were later to become ex-officio collectors. It is well recognized that emergency clauses may be referred to in order to determine the legislative intent. This rule is likewise so well recognized as to need no citation of authority.

CONCLUSION.

It is therefore the opinion of this Department that Section 12317, R. S. Mo. 1929, is the applicable law determining the bond which should be furnished and supplied by County Treasurers who are ex-officio collectors of revenue.

Respectfully submitted,

HARRY G. WALTNER, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

SHERIFF'S FEES:)
MILEAGE FEES:) Fees received by sheriff for mileage must be accounted for under Section 11828, R. S. 1929. Sections 11791, 11792, 11793, 11828 and 8357, R. S. 1929, construed as to "mileage."

December 14, 1936.

12-30

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge receipt of your letter of November 20, 1936, in which you request the opinion of this Department. Your letter reads as follows:

> "Section 11828., 1929 fixes the sum of $5,000 as the maximum amount that a sheriff may retain in fees for any one year.
>
> "We would like an opinion from your department as to whether mileage in serving all processes, and mileage and expenses in bringing prisoners to the Penitentiary and other state institutions is classified as expenses or fees which should be included in the $5,000 received for the year.
>
> "In determining this $5,000, what expenses, if any is the sheriff entitled to deduct from the total amount of money which he has received."

As we understand your question, it is whether or not mileage received by a sheriff in the serving of all processes and mileage and expense in bringing prisoners to the State Penitentiary and other State institutions are classified as expenses, or fees which should be included in the $5,000 received for the year.

Section 11828, R. S. Mo. 1929, Mo. St. Ann., at page 7036, provides in part as follows:

> "The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for one year. * * *."

And said section further provides that,

> "* * * such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; * *"

Sections 11789, 11791 and 11792, R. S. Mo. 1929, provide the statutory authority for fees and compensations for services rendered by the sheriff in performing his official duties.

Section 11789, supra, states,

> "Fees of sheriffs shall be allowed for their services as follows:"

and then follows a list of services and the stated amount of fees for each service, relative to mileage, as follows:

> "For each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held, provided that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip . . . . . .10"

Section 11791, supra, provides in part as follows:

> "Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows: * * * * *"

and provides compensation for services rendered in taking convicts to the penitentiary - both per diem and mileage for that service - and certain other mileage and transportation expenses for the convicts.

Section 11792, supra, provides that the sheriff, county marshal and other officers, shall be allowed mileage in certain cases. Said section provides in part as follows:

> "Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: * * * * "

Section 11793, R. S. Mo. 1929, provides:

> "No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

Your question turns on the proposition of whether remuneration or compensation, or whatever you may call it, received for "mileage" is a "fee" within the meaning of Section 11828, supra, and whether it must be accounted for by the sheriff in the statements required to be returned quarterly by him to the county court, by Section 11828.

If the money received for mileage is a fee within the meaning of the above statute it must be accounted for by the sheriff in his quarterly statement required to be filed with the county court, but if the mileage is an allowance for expenses of the office it need not be accounted for by him. There are many cases in Missouri which hold that the officer is entitled to certain expenses. In the much cited case of Ewing v. Vernon County, 216 Mo. 681, l. c. 694, the Supreme Court said:

> "Conceding there are no fees allowed for the delivery of a deed after recording or for transmitting a deed from one county to another, yet the statute does not contemplate that he should pay money out of his pocket in the performance of his official duty. Fees are the income of an office. Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo."

In the above case the court held that if the recorder purchased stamps to return recorded instruments to the party to whom they belong he was entitled to reimbursement from the county for this outlay as it was an obligation of the county. And further in the above case the court said:

> "The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation ofofficers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

In the case of State ex rel. Saline County v. Price, 246 S. W. 572, it was held that money received by the sheriff from the county for the board of prisoners in the county jail was not fees for which he had to account to the county court in determining the $5,000 limitation under the provisions of Section 11828, on the theory that it was money paid to the sheriff to reimburse him for expense incurred by him in the performance of a duty imposed upon him. And further in this case it was held that the court, in its capacity as representative of the people of the county, should itself assume the duty of providing reasonable sustenance for prisoners through the officer charged with their custody, who should not be permitted to profit by the performance of that duty. While his fees for other services pertaining to his official duties were fixed by law, and protected by constitutional immunity from change during his term of office, his compensation for feeding prisoners remained under the control of the county court to be fixed annually as circumstances might indicate.

Under the statute the outlay paid by the sheriff for the keep of prisoners might fluctuate from year to year during the sheriff's term as may be fixed by the county court at the November term preceding. It is, therefore, readily observable that the statute recognizes that it is not a "fee" and may be changed up or down during the sheriff's term of office and not come within the constitutional barrier that an officer's compensation and fees cannot be increased during his term.

In the two cases cited above it will be seen that where the obligation rests on the county to furnish certain necessaries for the use of the officer, in the Ewing case furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public, and stamps for the officer, the officer, if he furnishes same, is entitled to reimbursement; and where the sheriff furnishes board of prisoners, as in the Price case, which is an obligation of the county, it is not considered a "fee" but is an expense of the office for which he is entitled to reimbursement.

Coming now more directly to the question in your request - Is the mileage of the sheriff a fee, or is it an expense for which the sheriff does not have to account for in the $5000 limitation under Section 11828?

First, we shall examine the authorities in other states as to whether remuneration received for "mileage" is a "fee." In the case of Cremer v. Wapello County, 117 Iowa 580, Syl. 1, it is said:

> "Code 511, fixes the mileage of sheriffs for serving process, and Code Supp. 902, Section 510a, authorizes retention by the sheriff of all such mileage collected but declares that all 'fees' earned and uncollected at the end of each year shall belong to the county. Held that mileage charges were 'fees' within the latter section, and, when uncollected at the end of the year, in which the services were rendered, belonged to the county."

In Board of Managers, Grady County v. Castleman, 160 P. 891, 892, 66 Okla. 43, it is said:

> "Under a statute giving the sheriff sixty per cent of all 'fees' earned in serving or endeavoring to serve all criminal processes within the State, the term 'fees' clearly includes mileage."

To the same effect in the case of Harter v. Boone County, 116 N. E. 304, 306, 186 Ind. 301, it was held that "sheriff's mileage charges" on processes originating in their county being "fees" and are therefore sheriff's costs.

In the case of Roberts v. Brown County, 99 N. E. 1015 (Ind.) it was held that the amounts charged and collected by a sheriff as statutory mileage in the service of writs, summons, notices etc., are to be considered as fees provided by law on account of services in the discharge of the official duties, and not as a reimbursement to him which expenses

incidentally incurred in the service of such writs, so that when collected, they belong to the county and not to the sheriff personally.

The Supreme Court in the case of State ex rel. Selleck v. Gordon, State Auditor, 162 S. W. 629, 254 Mo. 471, l. c. 476, which was a mandamus proceeding to compel the Auditor to pay certain items of costs to the sheriff in a criminal case, the Court held that mileage was a "fee" within the meaning of Section 8, Article XIV, of the Constitution, in the following language:

> "The statute authorizing sheriffs to receive fees for mileage in subpoenaeing witnesses in criminal cases was first enacted in 1909, and after Sheriff Roland had begun his term of office. The sheriff was therefore not entitled to these fees, for the reason that, if allowed, they would amount to an increase of his fee during the term of office. (Art. XIV, Const. of Mo. Sec. 8.)"

From the language used in the above sections designating "mileage" as a "fee," the listing of same in the column as "other fees" in Sections 11789 and 11791, R. S. Mo. 1929, the interpretation given similar statutes in other states, and our Supreme Court's decision in the Gordon case, supra, it is our opinion that "mileage" is a "fee" within the meaning of Section 11828, supra, and must be accounted for in the sheriff's quarterly statements required to be filed under the above section.

We find some difficulty in construing and reconciling the various statutes where mileage fees are allowed the sheriff. We find running through all of these statutes and the interpretation given same in analogous cases, that where the obligation rests on the county or the public to furnish certain things or services, it is an expense of the public or county, but where the obligation rests on the officer to perform certain duties for which a certain fee is fixed by statute, it is not an expense of the office but is such a fee

as he must account for under Section 11828, supra. With this thought in mind we shall undertake to give you our opinion on the various statutes mentioned above, viz: (1) The ten cents per mile allowed the sheriff in serving writs and subpoenas, etc., under Section 11789, is an accountable fee under Section 11828; (2) The five cents per mile received by the sheriff for services of taking convicts to the Penitentiary and returning therefrom, under Section 11791, is an accountable fee under Section 11828; (3) the five cents per mile received by a guard accompanying the officer, under Section 11791, is not such a fee as must be accounted for by the sheriff; (4) the five cents per mile allowed the sheriff to cover all expenses of each convict while being taken to the Penitentiary, under Section 11791, is not an accountable fee, as it is expressly designated as expenses; and (5) under Section 8357, the traveling expenses and per diem allowed the officer in taking a person convicted to the Missouri Reformatory, are not accountable fees under Section 11828.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:EG

ELECTIONS: Voters may take sample ballots to election booths.

July 31, 1936

FILED
84

Honorable Floyd Sperry
Chairman
Henry County Democratic Committee
Clinton, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of July 31, 1936, requesting an opinion from this Department as to whether or not,

> "it is unlawful for any voter to take into the voting booth with him any sample ballot, or for a voter, that cannot read or write or for any reason cannot see to properly mark his ballot, to take a sample ballot to the election judge to have his ballot marked accordingly.
>
> "There is nothing in the law to this effect that I can find, so will you please send me an opinion on this matter."

We have examined the election laws of Missouri and do not find that there is any provision in the law which prevents a qualified voter to take with him to the election booth a sample ballot or other memoranda to assist the voter in properly preparing his ballot.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

SCHOOLS: All applicants for a third grade certificate must present evidence of having completed Four years of high school work or its equivalent.

August 25, 1936.

8-24

FILED
84

Hon. C. Spannagel
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion upon the following state of facts:

> "If a person held a third grade certificate o n or before September 1st, 1923, qualifying, at that time in preparation, could that person, at the present time (especially after such person had taught for and during intervening years) take and qualify for such examination with the same qualifications that such person had in taking the examination before September 1st, 1923.
>
> "In other words, if such person was qualified as a holder of a third grade certificate prior to September 1st, 1923, must she now in securing a renewal or taking another examination have the qualifications necessary for those who did not hold a third grade certificate prior to September 1st, 1923.
>
> "Example of Problem: A, in 1922 held a third grade certificate that did not require two years of High school work. Statute required those not holding a certificate as of September 1st, 1923, to have two years of high school work, If A, on the expiration of her third grade certificate, takes another examination must she have two years of high school work?"

Your attention is directed to Section 9472, R. S. Mo. 1929, relating to qualifications of persons in obtaining third grade certificates. It provides in part as follows:

> " **** from and after September 1, 1923, all applicants for a third grade certificate must present evidence of having completed two years of high school work or its equivalent. **** From and after September 1, 1925, all applicants for a third grade certificate must present evidence of having completed three years of such work, or its equivalent. From and after September 1, 1927, all applicants for a third grade certificate must present evidence of having completed four years of such work, or its equivalent. ** "

And further:

> " **** that provisions of this section shall not apply to any person who holds a certificate entitling him to teach in the schools of Missouri at the time of the taking effect of this section. **** "

The above statute contemplates that all applicants for third grade certificates must present evidence of their having completed two years of high school work or its equivalent from and after September 1, 1923; from and after September 1, 1925, all applicants for a third grade certificate must present evidence of having completed three years of such work; from and after September 1, 1927, all applicants for a third grade certificate must present evidence of having completed four years of such work.

The proviso above set forth in nowise did prohibit the teaching by a person holding a third grade certificate at the time of the enactment of the section above set forth in part. The proviso contemplated that a person at that time holding a certificate would be able to teach until such time as the expiration of the certificate theretofore issued.

Under the provisions of Section 9470, R. S. Mo. 1929, it provides in part that,

"third grade shall be valid for one year."

Under the provisions of Section 9473, R.S. Mo. 1929, providing for the renewal of teachers' certificates, it is stated that,

" * * * third grade certificate may be granted to any one person in but four consecutive years; * * * third grade certificates shall be renewed without examination once.

You may note from the above section of the statute that a person may be granted a third grade certificate to teach in but four consecutive years, meaning that the person may be issued a third grade certificate entitling him to teach in but four years and that such person may not teach after four years without holding a higher grade certificate. You will further note that a third grade certificate may only be renewed without examination once.

It is evident that the Legislature, in enacting these sections above mentioned, had in mind that the scholastic attainments of the teachers holding certificates should be increased from time to time so that the persons entitled to receive an education would receive the best obtainable.

"A", as mentioned in your hypothetical question, would upon the expiration of her third grade certificate have to take another examination before a certificate entitling her to teach would be granted, and she must have had at least four years of high school work as set forth in Section 9472, supra. "A" has taught during the four consecutive years holding a third grade certificate. At the present time "A" would not be entitled to receive another third grade certificate to teach in the public schools.

CONCLUSION

All applicants for a third grade certificate to teach in the public schools must present evidence of having completed four years of high school work, or its equivalent, as set forth in Section 9470, R.S. Mo. 1929, supra.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

RCS:FE

MOTOR VEHICLES: A motor vehicle used to transport other motor vehicles whould have to be registered and have license plates designed and provided for "commercial motor vehicles" as defined.

January 16, 1936.

1-16

FILED
85

Hon. V. H. Steward
Commissioner of Motor Vehicles
Jefferson City, Missouri

Dear Mr. Steward:

This is to acknowledge your letter as follows:

> "It has just been called to my attention that Transport Companies, registered with my department as Registered Dealers and who are using their transports in hauling or moving new cars from manufacturer to dealer, have been arrested or questioned by State Police Officers with reference to the use of Dealers license upon their transports.
>
> "Some of these transport companies while they have made application for and been issued Dealers license, are probably not Dealers 'in fact', and since the question has been raised as to whether or not these Transport Companies should be allowed to transport motor vehicles using Dealers license plates upon their transports, and especially in hauling for hire, we kindly request that your department furnish us an opinion fully covering the matter."

Article 1, Chapter 41, R. S. Mo. 1929, pertains to "motor vehicles" and a reading of said chapter shows that every motor vehicle operating upon the highways of the State

of Missouri must bear license plates. In order to obtain license plates the vehicle must be registered. Provision is also made for certain exemptions when the motor vehicle is owned by counties and municipalities. Section 7767, R. S. Mo. 1929. Manufacturers and dealers must have license plates. Section 7764, R. S. Mo. 1929. Owners must have license plates on their vehicles. Section 7761, Laws of Missouri, 1933, Extra Session, page 99.

Section 7759, R. S. Mo. 1929, defines the word "dealer" as follows:

> "Dealer.' Any person, firm, corporation, association, agent or sub-agent engaged in the sale or exchange of new, used or reconstructed motor vehicles or trailers."

It is to be noted that the transport companies do not come within the definition of the word "dealers." Consequently, said transport companies should not be permitted to register and obtain "dealers plates." Section 7761, supra, provides that owners of motor vehicles or trailers which will be operated on the highways of the State of Missouri must be registered. And upon such registration a set of plates bearing numbers is given to said owners.

Provision is further made for the classification of motor vehicles into those that are designated (a) as other than commercial vehicles,and (b) those designated as commercial vehicles. A separate fee is exacted for each of said vehicles. Referring to Section 7759, supra, it is seen that a "commercial vehicle" is defined as follows:

> "A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers."

The transport companies have motor vehicles which are designed and regularly used for carrying freight and merchandise,

to-wit, automobiles. Thus, having established the vehicle and the use to which it is put as being a "commercial motor vehicle," said vehicle should be registered as such and appropriate license plates issued covering said "commercial motor vehicle" so used by the transport companies. In other words, the transport automobiles would be in the same classification as trucks and would bear the same type of license plates, in our opinion.

You state that "Transport Companies, registered with my department as Registered Dealers * * * *, have been arrested or questioned by State Police Officers with reference to the use of dealers license upon their transports." If said transport companies were acting in good faith and were following instructions from your Department as to the use of said dealers license plates, then it is our further opinion that said transport companies should not be penalized by fine or otherwise, but that such transport companies should be given an opportunity to purchase and become equipped with the proper "commercial motor vehicle plates."

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General.

JLH:EG

COUNTY COLLECTORS: Taxes locally assessed against electric power and light company to be included in the matter of taxes locally assessed, for the purpose of determining collector's commission.

May 14, 1936

515

FILED
85

Mr. R. W. Starling
Prosecuting Attorney
Miller County
Tuscumbia, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this Department, which reads as follows:

"A question has arisen concerning the annual settlement of our county collector, Mr. Elmer Slone, and our county court has suggested that an official opinion be obtained from your office.

"The only matter involved is the amount of the salary to which the collector is entitled, and that is dependent upon his proper classification for salary purposes, and this, in turn, depends upon a construction of Section 9935, R. S. 1929, as amended by the Act of the Legislature, Laws of 1933, page 454, as applied to the facts of this case.

"The whole matter is involved in the local assessment and levy against the Union Electric Light & Power Co. In previous years, the Miller County real estate owned by this corporation, has been assessed by our county assessor and returned on the 'Land Book' as other real estate was assessed and returned. The same procedure

was followed by the assessor for the taxes for the year 1935. This local assessment of real estate belonging to said corporation, resulted in a levy and tax charge against the Union Electric for this item of their property of $49,080.30.

"The remaining locally levied and assessed property in Miller County is represented by a tax charge of $117,027.33, which, taken alone, would place the collector in Class VIII. If the tax charge against the local real property of the Union Electric is added to the above amount, he would be placed in Class X. Class eight fixes a salary of $3,000.00, whereas class ten provides for a salary of $4,000.00.

"The collector contends that the Union Electric taxes should be counted in fixing his classification, as it represents locally levied and assessed property, and that the Act of 1933 being the last expression of the Legislature on the subject, only excepts back taxes. To hold otherwise, it means a substantial reduction of the collector's salary in this county, at a time when added duties are placed upon him by reason of the abolishing of the treasurer's office."

Section 9935, Laws of Missouri 1933, page 454, provides, in part:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in

collecting the revenue, except back taxes, the following commissions and no more:

"I. In each county in this state wherein the whole state, county, bridge, road, school (school) and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to _____ dollars or less, a commission of _____ per cent on the amount collected."

The purpose of the above section is to determine the amount of compensation a county collector is to receive for his services in collecting the current revenue. The commission which the collector receives for collecting said revenue is based on the amount of state, county, bridge, road, school and all other local taxes assessed and levied for any one year.

Section 10066, Laws of Missouri 1933, pages 422 and 423, reads, in part:

"* * * * and all property, real and personal, including the franchises owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gas pipe lines, gasoline pipe lines, and express companies, shall be subject to taxation for state, county, municipal and other local purposes to the same extent as the property of private persons. And taxes levied thereon shall be levied and collected in the manner as is now or may hereafter be provided by law for the taxation of railroad property in this state, and county courts, and the county and state boards of equalization are hereby required to perform the same

> duties and are given the same powers in assessing, equalizing and adjusting the taxes on the property set forth in this section as the said courts and boards of equalization have or may hereafter be empowered with in assessing, equalizing, and adjusting the taxes on railroad property; * * * * * * * * * * *."

The above section provides that the property owned by telegraph, telephone, electric power and light companies, electric transmission lines, oil pipe lines, gasoline pipe lines and express companies shall be subject to taxation to the same extent as the property of private persons, and shall be levied and collected in the same manner as now or may hereafter be provided by law for the taxation of railroad property in this state.

In the case of State v. Gehner 286 S. W. l. c. 119, the Court copied with approval an opinion given by the Attorney General's office, as follows:

> "There is no question about how railroad property should be assessed. Section 13001, R.S.1919,may be said to be the index finger of authority pointing to the right to assess railroad property,and section 13002 enumerates certain specific property in pointing out the manner of such assessment. This has been called the distributable property of a railroad company,a sworn list of which must be furnished the state auditor within a stated time,to be assessed by the state board of equalization.
>
> "Section 13027,R.S.1919,provides that all property of the railroad company not particularized by section 13002 shall be assessed locally, and it will be seen that this section also particularizes somewhat the local property by saying what it includes such as land, machine, and workshops, roundhouses,warehouses, and other buildings, goods and chattels and office furniture of whatever kind or character.

These sections seem to be an undertaking to set forth in contradistinction what shall be termed distributable property and what may be termed the non-distributable property of railroads, and the sections named the assessing authority for each. The underlying principle characterizing the distinctions so made would seem to be that the distributable property consists of that which is used directly in the operation of the railroad, and the non-distributable property consists of such property whose use may be only indirectly involved.

"I take it that the particularization employed in sections 13002 and 13027 was not intended by the Legislature to be the conferring of a power with limitations upon that power to tax only what was therein specified, but that the undertaking to particularize was intended to be illustrative of the method or manner of handling the property for taxation purposes; that the property known as the distributable property of the railroad company, from its character and manner of its use, could be better handled for taxation purposes through the state board of equalization and a more nearly just assessment accomplished; and that for this reason the Legislature made it the state board's duty to make the assessment, while it left to the local authorities the right to assess purely local property. * * * * * *

"There was no such particularization in providing for the assessment and taxation of bridges, telegraph, telephone, and express companies, electric power and light companies, electric transmission lines and oil pipe lines, as was made by the Legislature in pointing out the method for taxing railroad property, but the section was made to refer back to the railroad statutes for the manner of taxation, and the two groups of statutes, I think, should be read together in order to

arrive at the legislative meaning.

"In the light of all these statutes, when read together, it is the opinion of this department that section 13056, R.S.1919, as amended by the act of 1923, means that such of the properties named therein as may be used distributably, including franchises, are to be assessed by the state tax commission, and that the remainder, or nondistributable property, is to be left to the local authorities for assessment according to the practice followed by the tax commission prior to the opinion of July 31, 1923."

In view of the above, and the practice followed in this State by the State Tax Commission for many years, there can be no doubt that the distributable property owned by telegraph, telephone, electric power and light companies, electric transmission lines, are to be assessed by the State Tax Commission and that the remainder or nondistributable property is locally assessed. It was so held in the case of State v. Baker 293 S. W. 399.

This Department, in an opinion given to Lewis A. Duval, Prosecuting Attorney Macon County, Missouri, under date of August 21, 1935, held that the amount of taxes assessed and levied against a railroad should not be included in the amount of taxes assessed and levied for the purpose of determining the collector's commission under Section 9935, supra. The reason for so holding, however, was that Section 10044, Revised Statutes Missouri 1929, provides a special commission for the collector in collecting the railroad taxes. While taxes on property of telegraph, telephone and electric power and light companies are assessed and collected in the same manner as taxes on railroad property, there is no special statute allowing the county collector a special commission for the collection of these taxes.

CONCLUSION

It is, therefore, the opinion of this Department that the taxes locally assessed against electric power and light companies are to be included in the total amount of taxes locally assessed and levied for the purpose of determining the commission which the county collector receives for collecting said revenue.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JET:LC

TITLE: 1. Officers and members of the Missouri State Highway Patrol are civil officers.
2. Regimental adjutants permanently on military duty and drawing regular salaries from the state are not entitled to draw additional compensation for attendance at regimental schools.

10/9

October 9, 1936

FILED
85

Honorable E. M. Stayton
Brigadier General
Missouri National Guard
Kansas City, Missouri

Dear General Stayton:

This will acknowledge receipt of your request for an opinion, which reads as follows:

> "I am in receipt of the opinion of Mr. Russell C. Stone, Asst. Attorney General, Mo., prepared at the request of Colonel Ray E. Watson, that state employees who are members of the National Guard who are properly ordered on military duty, may draw pay for such military service from State Funds although they may, at the same time, be drawing pay from the State for their regular civil occupation.
>
> "Last June, I ordered a School for Lieutenants and also a series of Regimental Schools for officers. Being under the impression that state employees could not properly be paid from State Funds for this military service, I refused to pay several members of the State Highway Patrol and the Regimental Adjutants, who are on the state pay roll for military duty permanently, for attendance at these schools.
>
> Your opinion is requested on the following points:
>
> 1. Should I now pay the members of the Highway Patrol and other civil employees

of the state for attendance at these schools?

2. Should I now pay those who are permanently on Military duty and drawing regular salaries from the state (Regimental Adjutants, etc.) for attendance at these schools?"

Your attention is directed to the case of Gracey vs. St. Louis, 213, Mo. L. C. 394, wherein the court in discussing who are public officers said:

"* * * For instance, Mc Farlane, J., in State ex rel. v. Bus, 135 Mo. l. c. 332, declares the sum of the matter to be 'that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer.' An office has been defined as 'a special trust or charge created by competent authority'--more tersely still, 'a public office is a public trust.' His oath, his bond, his liability to be called to account as a public offender for misfeasance or non-feasance, the tenure of his position, etc., have been said to be indicia of a public officer. (State ex rel. v. May, supra; Throop v. Langdon, 40 Mich. 682.) And the general doctrine is that the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers as well as that of duty. (6 Words and Phrases, p. 4923.) It has been aptly said that the true test of public office is 'that it is a parcel of the administration of government.'"

Your attention is further directed to the Laws of Missouri,

1931, Page 231, Section 1, relating to the Missouri State Highway Patrol. Said Section reads as follows:

> "There is hereby created a force consisting of a superintendent and other officers and patrolmen, as herein provided, to be known as 'Missouri state highway patrol,' which shall be vested with the powers and duties specified in this act and all powers necessary to enable the members of the patrol to fully and effectively carry out the purposes of this act but the powers and duties hereby conferred on the members of such patrol shall be supplementary to and in no way a limitation on the powers and duties of sheriffs, police officers, or other peace officers of this state."

Section 2 of the State Highway Patrol Act, above referred to, reads in part as follows:

> "* * *The words 'peace officers' as used in this act shall be deemed and taken to include sheriffs, police officers and other peace officers of this state."

Section 10 of said Act, provides in part as follows:

> "The members of the patrol before entering upon the discharge of ther duties, shall each take and subscribe an oath to support the Constitution and laws of the United States and the state of Missouri and to faithfully demean themselves in office in the form prescribed by section 6 article XIV of the Constitution of this state and they shall each give bond to be approved by the commission for the faithful performance of the duties of their respective offices * * *."

Other sections of the State Highway Patrol Act, relates

to duties and powers given to the members of the patrol. It is evident, from a thorough reading of this act, that the legislature contemplated that members of the highway patrol should not become a part of, or a supplement to, the military forces of this state.

In keeping within the definition of a public officer, as indicated in the case of Gracey vs. St. Louis, supra, we find that members of the Missouri State Highway Patrol are confined in their duties within the purview of the Act. Their duties have been specifically defined by competent authority. It is also to be noted that the members of the patrol are required to take an oath and give bond for the faithful performance of their duties. The members may be called to account for any misfeasance or nonfeasance during the tenure of their office. Thus, it may be seen, in keeping with the aforementioned definition that such members of the highway patrol are public officers or civil officers contra-distinguished from military officers.

We therefore rule, that members of the Missouri State Highway Patrol are civil officers and if any of the members of said patrol hold a commission in the Missouri National Guard, as military officers, then such members would be entitled to receive compensation as military officers when attending schools of instruction in addition to compensation received as being a member of the patrol, even though the compensation accrues at the same time.

As relates to any compensation that might be paid civil employees of the state, who also hold a commission as military officers, we do not, in the course of this opinion, discuss because the facts in each instance do not permit the enunciation of a hard and fast rule. In this respect, I have been largely governed by the cases read; the courts having concerned themselves only with the facts as presented. To discuss the various contingencies that may or may not arise relative to the consistency or compatibility of various offices would be platitudinous.

Under the provisions of Section 13824, R.S. Mo., 1929, it provides in part as follows:

> "The military council shall formulate plans for the organization, instruction, equipment and maintenance of the military forces of the state, provide for

> encampment and all other field and armory instruction and make allotments of funds and supplies appropriated or furnished for the support, equipment and maintenance of the military forces of the state. All appropriations made for military purposes shall be apportioned and expended by the council."

Under the provisions of Section 13834, R. S. Mo., 1929, relating to the appointment of regimental officers, it provides in part as follows:

> "Regimental and separate battalion and squadron staff officers shall be appointed by the commanding general on the recommendation of the regimental or separate battalion or squadron commander."

Section 13873, relating to the authority of military council to fix the pay of officers placed on duty, under the provisions of Chapter 116, R. S. Mo., 1929, provides in part as follows:

> "The military council shall have power to fix the pay and allowances of officers and enlisted men placed on duty under the provisions of this chapter."

You will note that the military council may make allotments of funds that have been appropriated and furnished for the support and maintenance of the military forces of the state. It has come to the attention of the writer that regimental adjutants, appointed under the provisions of Chapter 116, supra, are actively engaged in their capacities as military officers in the several regimental offices within this state. These regimental adjutants receive their compensation as fixed by the military council, under the provisions of Section 13824, supra, and as has been further learned by the writer, are continuously and actively engaged in performing their duties as military officers.

Since the military council provides for instruction of the

military officers in the military forces of the state, it is obvious that such instruction or attendance at regimental schools be incident to that of a military officers and we therefore rule, that military officers drawing salaries regularly are not entitled to any additional salary while in attendance at regimental schools.

Very truly yours,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

R S:RT

COUNTY BUDGET ACT: County Treasurer can meet December, 1936, accounts if he has the money on hand.

December 31, 1936

FILED
85

Honorable William E. Stewart
Prosecuting Attorney Knox County
Edina, Missouri

Dear Mr. Stewart:

This Department is in receipt of your letter of December 29, wherein you make a request as follows:

> "The County Treasurer of this county asked me if, under the law, he could pay warrants that were issued in December, 1936, after the 1st of the year before the budget was made out. I am sure that this question has come before you and I would like to have your ruling on it. It looks to me like he should pay the warrant issued in 1936 if he has the money. "

The County Budget Act has never received any construction by the Supreme Court except in the case of Graves v. Jackson County 75 S. W. (2d) 842; however, it did not involve any construction or bearing on the first eight sections except as to the title of the Act. And your county, being less than 50,000 in population, is governed exclusively by the first eight sections.

Section 1 of the Act, page 341, Laws of 1933, contains the following sentence: "The receipts shall show the cash balance on hand as of January first and not obligated."

Section 4, page 343, in enumerating the duties of the county clerk, states that not later than the first day of February, among the data to be prepared by the clerk is as follows:

> "Cash balance in county revenue fund January 1 of current year.

"Less outstanding warrants for preceding years as follows: (list total by years)

"Less all known lawful obligations against the county December 31, last, and for which warrants were not drawn at that date (itemized list of these obligations must be attached to the estimate)

"Total unpaid obligations of the county on January 1st of current year. (This shall include unpaid warrants and outstanding bills for which warrants may issue)

"Net cash balance on hand January 1st of current year.

Section 8, page 345, makes it the mandatory duty of the county court, at the February term, to go over the estimates and revise and amend the same in such a way as to promote efficiency and economy in county government.

You state in your letter that it is your conclusion that it would be proper for warrants to be issued for December, 1936, obligations, if the county has the money. In this we concur and agree for the reason that the budget is not made up until February and the complete data as of January 1 will be before the county court, and the balance of cash or unobligated funds may at that time be placed before the court for consideration in balancing the budget. The only provision we offer is to the effect that the funds out of which the December, 1936, obligations are paid should be from the revenue of that year and not from the 1937 revenue.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

OWN:LC

GAMBLING DEVICES - Who has right to money in seized slot machines?

128

FILED 16

January 24, 1936.

Hon. Walter G. Stillwell,
Prosecuting Attorney of Marion County,
Hannibal, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of December 18, 1935, such request being in the following terms:

> "Recently two members of the Hannibal Police force seized and confiscated two slot machines which they found within the corporate limits of this city. A complaint was filed in the City court and the owner of the establishment where these machines were taken was not in court, but was represented by counsel. A plea of guilty was entered and a fine imposed.
>
> Mr. Shea, our local Chief of Police, advised me that in his opinion there is approximately seventy or eighty dollars in these two machines. Of course there is no question as to Mr. Shea's authority acting as Chief of Police in destroying both of these machines, but the question arises as to the money. Counsel representing the defendant has taken the position that his client is entitled to the money taken from these illegal devices, and the opinion has also been expressed that the Chief of Police is not within his rights in returning this money to the person who admitted ownership of the appliances.
>
> The question involved is:
>
> What disposition should be made of this money at the time the machines are destroyed?
>
> Hannibal, as you know, is a City operating under a special charter and I am not able to find anything either in the charter or the ordinances

"providing for such condition.

In as much as these machines are being held and the matter cannot be ultimately disposed of until Mr. Shea receives your opinion, I would appreciate having your suggestions at your earliest possible convenience."

On October 23, 1934, we issued an opinion to Hon. Herbert M. Braden, Prosecuting Attorney of Livingston County, Chillicothe, Missouri, which in our opinion answers the question raised in your letter. That opinion dealt with the proper disposition of money in seized slot machines where no claim was made by any person to the ownership thereof, but in such opinion we analyzed the state of the title to money in slot machines and ruled that "the owner of this money, who is the owner of the slot machine or his assignee, would have a present right (as soon as it was decided that this money was not to be used in a criminal proceeding as evidence and the judge had so ordered under Section 3787) to claim such money and have it delivered over to him." Under the facts stated in your letter we understand that the criminal prosecution has been closed, and that the money will no longer be needed as evidence. We enclose a copy of our opinion to Mr. Braden of October 23, 1934.

In conclusion, it is our opinion that money in a slot machine seized as a gambling device under R. S. Missouri, 1929, Section 3783, should be returned, when the necessity of retaining possession thereof for use as criminal evidence no longer exists, by the officer having possession of it, to the owner of such machine or the person who, by contract with the owner, is entitled to the coins in such machine.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

MOTOR VEHICLES: State employes and employes of counties and municipalities not required to register as "chauffeurs" defined by Section 7759, R. S. 1929.

January 29, 1936.

1-29

FILED
86

Honorable Louis V. Stigall
Chief Counsel
Missouri State Highway Department
Jefferson City, Missouri

Dear Mr. Stigall:

This is to acknowledge your letters dated January 21st and January 27th, 1936, relative to a communication from Mr. Wyatt Hawkins, Acting Division Engineer at Hannibal, Missouri. Mr. Hawkins' letter reads as follows:

> "It has come to our attention that a constable in Clark County is making the statement that he is going to make arrests of Missouri State Highway Department and County Highway Department employees, driving state and county owned equipment.
>
> "Will you kindly secure an opinion for us, from the Attorney General's Office, as to whether the law requires drivers of state and county owned equipment to take out chauffeurs' license or operators' certificates?"

The Missouri State Highway Commission is a subordinate branch of the Executive Department of the State of Missouri. In Bush v. State Highway Commission of Missouri, 46 S. W. (2d) 854, Division No. 2 of the Supreme Court, page 858, said the following:

> "It thus having been determined that the commission is a subordinate branch of the executive department, it is not liable in tort for the acts of its agents and employees upon grounds of public policy heretofore stated."

On January 21, 1935, this Department rendered an opinion to Colonel B. M. Casteel, Superintendent of Missouri State Highway Patrol, wherein we held:

> "From the above and foregoing it is our opinion that the employes of this state and of the political subdivisions thereof, who operate such motor vehicles, do not come within the classification of "registered operators" as defined by Section 7759, R. S. Mo. 1929, and therefore are not required to be "registered operators.""

Copy of the above opinion herewith enclosed.

It is our further opinion that employes of this State and of the political sub-divisions thereof do not come within the classification of "chauffeurs" as defined by Section 7759, R. S. Mo. 1929, and, therefore, are not required to be registered as chauffeurs for the same reasons stated in the opinion dated June 21, 1935, relating to "registered operators." It follows that the answer to Mr. Hawkins question "as to whether the law requires drivers of state and county equipment to take out chauffeurs' license or operators' certificates" should be in the negative, in our opinion.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG

HIGHWAY DEPARTMENT:) Sections 10991 and 11014, R. S. 1929, have
LEVEES:) reference to State built levees.
Prosecutions for government built levees
under Federal law.

January 29, 1936.

1-29

FILED
86

Honorable Louis V. Stigall
Chief Counsel
State Highway Department
Jefferson City, Missouri

LEGAL: Mississippi
County Location of
Road on Levee

Dear Mr. Stigall:

This is to acknowledge your letter of recent date in which you request this Department to reinstate your former request for an opinion, which had previously been withdrawn by you, with reference to the construction of a public highway on Federal Government levees in Mississippi County, Missouri.

We have referred to your former correspondence concerning this matter and the question asked is based on the following statement of facts submitted in your letters, viz.:

The Federal Government has heretofore constructed a levee in Mississippi County, Missouri, under the authority of U. S. C. A., Title 33, Section 702a, and succeeding sections, for flood control on the Mississippi River. The State Highway Department since the construction of the above levee has built, with the consent of the Federal Government, 6½ miles of gravel roadway on top of said levee from Wyatt to Birds Point, Mississippi County, Missouri, and the same has been in use for sometime by the general public as a public highway.

The question you ask is whether or not the top of the government built levee may be used by the State Highway Department in the construction of a road thereon and may be then used by the public as a roadway, in view of Sections 10991 and 11014, R. S. Mo. 1929?

Section 10991, supra, is a part and parcel of Article 7, Chapter 64, R. S. Mo. 1929, pertaining to the organization of levee districts by county courts, and is as follows:

> "It shall be unlawful for any person to use the levees built under the provisions of this article as a roadway, by riding any horse, mule or ass thereon, or by driving any vehicle thereon; and any person violating this provision shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten nor more than fifty dollars, or imprisoned in the county jail not less than fifteen days nor more than thirty days for each offense, or both such fine and imprisonment, at the discretion of the court having jurisdiction of the same."

It will be noted by the above section that it is a violation of the law and one is guilty of a misdemeanor "to use the levees built under the provisions of this article as a roadway, by riding any horse, mule or ass thereon, or by driving any vehicle thereon; * * *." This being a penal statute, it is elementary that it must be strictly construed. An information or indictment drawn under the provisions of this section would, to be sufficient, necessarily have to charge, and it would be essential to prove, to secure conviction, that the levee was built under the provisions of Article 7, Chapter 64, R. S. Mo. 1929.

Assuming, as you state in your letter, that the above levee was constructed by the United States Government and not under Article 7 aforesaid, it would not be a violation of Section 10991 for one to commit the aforesaid prohibited acts on a government built levee.

Section 11014, R. S. Mo. 1929, provides as follows:

"It shall be unlawful for any person, persons, association or corporation to fill up, or cause to be filled up, injure, impair or destroy the usefulness of any drain, levee, ditch, dike revetment or other works now constructed or hereafter constructed in any drainage or levee districts organized under the provisions of any previous existing or future laws of Missouri, relating to the formation of drainage or levee districts (to reclaim swamp, wet and overflowed lands for sanitary or agricultural purposes). It shall also be unlawful for any person, persons, association or corporation to in any manner throw or cause to be thrown, fall or cause to be fallen, place or cause to be placed, floated or cause to be floated any tree, tree top, brush, log or other substance in any drain, ditch, floodway, basin or other works constructed by any drainage district constructed in this state; or to build any fence, dam, or other works across any such ditch; or to pasture any stock on any levee or right of way of any levee while the waters in the river or rivers, are at or near flood stage in such rivers; or to use any such levee for road purposes by driving or riding any ass, mule, horse or oxen on the top or on the side of any levee at any time. Any person violating the foregoing or any one of the foregoing provisions shall be guilty of a misdemeanor and upon conviction shall be fined for each and every offense a sum not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than

> thirty nor more than two hundred days or by both such fine and imprisonment: Provided, that when a corporation has been found guilty of violating any of the foregoing provisions the president, director, manager or other employe of such corporation having charge of the work under which the violation occurred shall be subject also to the foregoing penalties."

It will be noted that said section by its provisions sets forth several distinct misdemeanors for crimes that might be committed on drains, levees, ditches, dikes, revetments or other works in any drainage or levee district organized under the provisions of any previous existing or future laws of Missouri, relating to the formation of drainage or levee district (to reclaim swamp, wet and overflowed lands for sanitary or agricultural purposes). This section is also directed at drainage or levees constructed under the provisions of the Missouri statutes and provides penalties for violations thereof.

Both of these sections refer to levees built under State laws and have no reference to those built by the Government for flood control. The United States Government, by statutes, has made ample provisions for prosecutions for injuries and damages done to Federal built levees. Section 408, Title 33, U. S. C. A.; Houck v. U. S. (Mo. 1912), 201 Fed. 862, 122 C.C.A. 200.

Conclusion.

It is, therefore, the opinion of this Department that the two sections referred to in your letter, namely, Sections 10991 and 11014, R. S. Mo. 1929, pertain to and are applicable to levees built under the state laws, and do not have reference to government built levees.

Very truly yours,

CRH:EG

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

OUSTER PROCEEDINGS: Civil procedure applies to service of summons.

February 11, 1936

FILED 86

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Stillwell:

You have requested our opinion on the following question:

"A suit has been brought by me as Prosecuting Attorney under Section 11202, R. S. Mo. 1929 to remove Arch O. Leonard from his position as Sheriff of Marion County, based on alleged violations of the criminal law.

"What is the nature of the service of process required to give the defendant jurisdiction in certain cases?"

It is our opinion that this action is a civil action and the pleadings, process and other procedure are to be governed by the general code of civil procedure. It is therefore necessary that a summons be served upon the defendant in said proceeding at least thirty days before the first day of the next succeeding term of the court in which the case is filed, to-wit, in your particular case, the April, 1936 term of the Hannibal Court of Common Pleas. Service should be obtained returnable to said April term in the ordinary manner used in any civil case.

Under the statute, it is our further opinion that said service is to be had by the present Coroner of Marion County.

Yours very truly,

FOR OPINION 11

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

FER:FE

MONOPOLIES:)
) Any contract, agreement or arrangements made with intent to create or maintain a monopoly, contrary to the provisions of Chapter 47, R. S. 1929.
CORPORATIONS:)

March 4, 1936. 3/9

FILED
86

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Stillwell:

This is to acknowledge your letter dated February 28, 1936, as follows:

> "This office is now faced with a proposition which I feel is of sufficient importance to warrant an opinion from your office.
>
> "In this city there are two ice plants manufacturing artificial ice. There are no concerns or individuals engaged in the natural ice business. Neither of the two manufacturing ice plants maintain or operate wagons for the purpose of distributing ice to customers throughout this city. At the present time there are at least four or five individuals or partnerships engaged in the retail sale of ice direct to the customer. Both of the ice plants retail ice at their platform and in turn sell it wholesale to the people engaged solely in the retail ice business. It is my frank opinion that the people now engaged in the retail business are furnishing first class and efficient service to the homes and business establishments in Hannibal at a fair and reasonable price and that these individuals have ample facilities to take care of the trade.

"The present ice plants seem to feel that they are being adequately and most efficiently served by the firms and individuals now engaged in the retailing and distribution of ice and the question which has arisen is that other parties have expressed a desire to engage in the retailing and distribution of ice in this city. Is it compulsory on their part to sell at wholesale to any other parties desiring to engage in the retailing and distribution of ice in this city?

"The two ice plants in this city have no connection with each other, nor are they financially interested in any of the individuals or concerns that are peddling ice. The applicable provisions of law as I see it, are contained in Article 1 of Chapter 47, R. S. Mo. 1929. (Page 2420).

"I would like particularly to know that in the event either of the local plants or both would refuse to sell ice to people not now engaged in the distribution thereof but who contemplate entering into this field, would it be a violation of the above mentioned chapter.

"I would deeply appreciate your usual prompt attention to this inquiry."

While you only request our opinion on the singular subject of whether or not your two local ice plants, in refusing to sell ice to people not now engaged in the distribution thereof but who contemplate entering into the field, would be violating Article 1, Chapter 47, R. S. Mo. 1929. Although we could dispose of said question with an affirmative or negative answer and cite authority therefor, yet, in view of the fact that it is of such far-reaching concern to the public, we do not deem it amiss to elaborate upon monopolies.

The appellate courts of Missouri have had many cases presented to them concerning the right of corporations and persons attempting to circumvent the statutes relating to monopolies, pools and trusts, and a reading of their decisions, hereinafter cited, show that the courts have very zealously guarded the interests of the public in closely scrutinizing the facts in each individual case, with the result that at the present time decisions may be found in the reports condemning all arrangments, contracts, agreements and combinations and circumstances that tend to lessen, or with a view to lessen, free and full competition. State ex rel. v. Polar Wave Ice & Fuel Co., 259 Mo. 578, l. c. 608.

Chapter 47, R. S. Mo. 1929, relates to "Pools, Trusts, Conspiracies and Discriminations" and Article 1 of said chapter defines "pool and trust agreements." Section 8701. Section 8702 makes combinations to boycott or threaten to boycott a conspiracy. Section 8703 makes certain combinations to increase prices a conspiracy. Section 8704 prescribes penalties for violations of provisions of said sections.

In State ex rel. v. Polar Wave Ice & Fuel Co., supra, the Supreme Court of Missouri, speaking through Graves, J., at page 607 quoted the following from State ex inf. v. International Harvester Co., 237 Mo., l. c. 405, concerning Section 8703, as follows:

> "'It will be noticed that our statute is exceedingly broad. It includes not only contracts, agreements and understandings, but also all arrangements and combinations. It includes not only all those things which tend to lessen full and free competition, but likewise all those things which were done with the view of lessening full and free competition. In other words, this statute punctuated and worded as it is, covers two classes of 'arrangements, contracts, agreements, combinations and understandings'; i. e., (1) those that were made 'with the view to lessen . . . full and free competition,' but which may have

> never been so operated as to reach the result had in view or in mind; and (2) those made 'which tend to lessen . . . full and free competition' and which in fact did lessen competition.
>
> "'I repeat that this statute, when fairly analyzed thus resolves itself, so far as the question under discussion is concerned. The several clauses purposely placed therein by the lawmaking power do not mean one and the same thing, but were put there purposely to be far reaching in effect. It was intended to reach all conceivable methods which might be designed by shrewd 'captains of finance.' The purpose of the statute was to thwart action in the very incipiency, as well as all down the line. It was designed to reach all arrangements, etc., which were designed and made with the view of lessening competition, as well as those which in fact did that thing. Either class falls equally under the ban of the statute--one no more nor less than the other.'"

Perhaps at the present time the case that is most widely known and more frequently cited on the subject of monopolies and trust agreements, is State ex inf. v. Standard Oil Co., 218 Mo. 1. The main question in that case was, "was there an unlawful combination or agreement existing between respondents in restraint of trade and in fixing and maintaining prices." (l. c. 393) The court en banc extensively reviewed the facts and came to the conclusion that respondents were guilty and entered a decree of ouster. At page 405 the court said:

> "In the consideration of a similar question, arising under the Anti-trust Acts of Congress, Sanborn, J., in the case of Phillips v. Iola Cement Co., 61 C. C. A. 19, used the following language:

> "'It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the States. If its necessary effect is to stifle competition or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the States, while its main purpose and chief effects are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of inter-state commerce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of the business, to enhance their trade, and to make their occupations gainful, so long as those combinations anddevices do not necessarily have a direct and substantial effect to restrict competition in commerce among the States. (Cases cited.)"

The court,after summarizing all the facts as to the acts of respondents in dividing the state into districts for the purpose of selling oil and giving a monopoly to each corporation, arrived at the following conclusion (page 447):

> "Can it be supposed for a moment that such phenomenal results could have been accomplished by them if they had been engaged in open competition with each other? Certainly not. They knew that, and their object and purpose in entering into the combination was to monopolize the trade and maintain prices, which they did against all other competitors."

It is thus seen that the court constantly looked to the subject matter as to whether or not said agreements tended to stifle competition. The results accomplished by said arrangements were paramount with the court and not the manner and method that produced said results. In other words, any arrangement of whatsoever kind and nature that produces the result that deprives the public of the advantages of free competition, is condemned. Note the language found at page 451:

> "The court quotes again with approval the same passage from the decision of Chief Justice Fuller in United States v. E. C. Knight Co., 156 U. S. l. c. 16, quoted in the insurance trust case, to the effect that, in order to establish a combination, 'it is not essential that its results shall be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.'"

In Dietrich v. Cape Brewery & Ice Co. et al., 286 S. W. 38, the Supreme Court held that the selling of ice was a commodity within the purview of the statutes relating to monopolies. The evidence in the above case was to the effect that two manufacturers of ice in the City of Cape Girardeau zoned the city into three zones and agreed to sell ice to only certain persons in said zones. The court held that the facts made a case that was submissible. The court at page 43 said the following relative to a "conspiracy":

> "'A conspiracy is an agreement or understanding between two or more persons to do an unlawful act, or to use unlawful means to do an act which is lawful, but it is not necessary that it should be proven by an express agreement or by direct evidence, but may be proven like any other fact by circumstantial evidence. * * * But it must exist between at least two persons.' Ross v. Mineral Land Co., 162 Mo. 331, 62 S. W. 987."

The case of State ex rel. v. People's Ice Co., 246 Mo. 168, also involved a monopoly to buy and sell ice (l. c. 182). The court at page 213 said the following:

> "The new company took over and carried out the contracts of the old; contracts which tend, on their face, to show a purpose to restrict competition. The People's Ice & Fuel Company had been organized and employed as a mere agency by and through which the purposes of the original agreement among the several ice companies in business in Kansas City in 1898 might be carried out. It was not, nor could it have been, authorized by its charter to directly or indirectly monopolize the ice business, and in so far as it proceeded to effectuate the plans of other corporations and individuals to do so, it was acting outside its charter powers and in defiance of law. The People's Ice, Storage & Fuel Company was not, nor could it have been, chartered to purchase from the People's Ice & Fuel Company any conspiracy to restrict competition in which the latter was engaged, but its subsequent participation in any such agreement cannot be defended on the ground that the agreement or conspiracy was in existence before the corporation was. To hold otherwise is to say that individuals and corporations may conspire to restrain trade and lessen competition, in violation of the statute, and then by subsequently forming a corporation to carry out that conspiracy put themselves and the corporation thus formed beyond the reach of the statute. That the statute can be thus evaded we decline to hold."

At page 221 the court said:

> "The statute of this State leaves scant room for construction. We are not concerned in this case with any question as to a contract, otherwise lawful, which incidentally restrains

> trade. The rule applicable in such a case is not applicable in this. Nor is it within our province to give the statute any other meaning than its language imports. Our duty to apply the statute as it is written is as plain as the language of that statute and in that language there is no ambiguity. The statute condemns every direct restraint of trade, great or small. It closes the only door through which doubts as to its construction could enter by positively prohibiting defined combinations without regard to what the courts may think as to the extent of their effect. The Legislature saw fit to ordain 'that competition and not combination' should obtain in business in the State. As long as it moves in its constitutional orbit the judgment of the Legislature is final and the wisdom of its enactments is not open to question in the courts."

The St. Louis Court of Appeals in Walsh v. Ass'n. of Master Plumbers, 97 Mo. App. 280, held a contract unlawful which only permitted members of the Association of Master Plumbers to purchase supplies from respondent corporation (l. c. 291).

A reading of the above cases conclusively shows that any manufacturer or seller of any products, commodity or article that enters into an agreement, contract or otherwise, that results in the stifling of free and full competition, violates the statutes and is unlawful. The manner and method employed is of small consequence if the results tend in part or in full to establish a monopoly. However, the courts have recognized the right of one to sell to whomsoever he choses just so long as such person does not have the intent to stifle competition and tend to create a monopoly. Thus when a person sells to only certain individuals and refuses to sell to others, the facts should be closely scrutinized to see if the results reached do in fact tend to create a monopoly. You will understand then that it is difficult for us to give a "yes" or "no" answer to your question as to the local plants

in refusing to sell ice to people contemplating going into the ice business.

In Walsh v. Ass'n. of Master Plumbers, supra, the court very ably discussed the right of citizens to deal with whomsoever such pleases as follows (l. c. 288):

> "In Hunt v. Simonds, 19 Mo., at page 586, the court said: 'It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others.'
>
> "The same doctrine is announced in Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212; State ex rel. Star Pub. Co. v. Associated Press, 159 Mo. 410; Carew v. Rutherford, 106 Mass. 13; Brewster v. C. Miller's Sons, 38 L. R. A. (Ky.) 505. Cooley, in his work on Torts (2 Ed.), page 328, states the principle broadly as follows: 'It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.'
>
> "In Walker v. Cronin, 107 Mass. 555, it is said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbances or annoyance. If disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with.'

"A capitalist has the right to employ his capital or to hide it away and refuse to use it, so long as he does not become a public charge, and a man without capital may labor or refuse to labor, so long as he keeps out of the poorhouse. So also have capitalists the right to combine their capital in productive enterprises and by lawful competition drive the individual producer and the smaller ones out of business. And laborers and artisans have the right to form unions and by their united effort fight competition by lawful means. Snow v. Wheeler, 113 Mass. 179; Master Stevedores' Association v. Walsh, 2 Daly 1; Reg. v. Rowlands, (1851) 2 Den. C. C. 364. And courts will not lay their hands upon either to restrain them, however fierce the competition, so long as their methods are lawful. But if either steps without the pale of the law and by fraud, misrepresentation, intimidation, obstruction or molestation hinders one in his business or his avocation as an artisan or laborer, courts have not hesitated to interfere and to afford remedial relief, either by awarding compensatory damages in an action at law or, where the injury is a continuing one, by granting injunctive relief. (Many cases cited.)"

Corpus Juris, Vol. 41, page 138, says the following:

"In the absence of any intent or purpose to create or maintain a monopoly, a trader or manufacturer engaged in an entirely private business has the right to exercise his own independent discretion as to parties with whom he may deal, and may sell or refuse to sell to whom he pleases, unless such refusal is part of an illegal conspiracy or combination; * * *"

In Dietrich v. Cape Brewery & Ice Co., supra, the court also said (page 43):

> "Argument is advanced, founded upon the right of a person engaged in a business private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally, by independent action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder. Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691; State ex rel. v. Peoples Ice Co., 246 Mo. 221, 151 S. W. 101; State ex inf. v. Armour Packing Co., 265 Mo. 148, 176 S. W. 382."

The case of Cantrell v. Knight, 72 S. W. (2d) 196, is an interesting case which holds a contract was not void as in restraint of trade; the Springfield Court of Appeals (l. c. 200) having the following to say:

> "The contract is not void as in restraint of trade. It is based upon a valuable consideration, as well as the mutual promises, and while not limited as to time it is limited to the particular location where the business of defendant was being conducted. The failure of the contract to limit as to time does not make it void if otherwise valid. Gordon v. Mansfield, 84 Mo. App. 367; Vandiver v. J. K. Robertson & Son, 125 Mo. App. 307, 102 S. W. 659; Clabaugh v. Heibner (Mo. App.) 236

> S. W. 396. While the contract may be said to restrain trade to a limited extent, that was merely incidental and not unreasonable. It is not such a contract, standing alone, as is prohibited by our statute against pools, trusts and discriminations (chapter 47, Sec. 8700 et seq., R. S. Mo. 1929 (Mo. St. Ann. Sec. 8700 et seq., p. 6486 et seq.)). State ex rel. v. Standard Oil Company, 218 Mo. loc. cit. 416, 116 S. W. 902, Finck v. Schneider Granite Co., 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452. This is simply a contract between two individuals for the exclusive right to sell on the part of one, and the right to purchase on the part of the other, all of a certain product at a particular place and did not materially affect the public interest. We are not considering a case where there might be several of such contracts, which, considered together, would render what was otherwise a legal contract, entirely void as a conspiracy in restraint of trade."

Conclusion.

From the foregoing it is our opinion that the two local plants located in Hannibal, Missouri, may "refuse to sell ice to people not now engaged in the distribution thereof but who contemplate entering into this field," and not violate the provisions of Article 1, Chapter 47, R. S. Mo. 1929, if there is an absence of an intent or purpose to create or maintain a monopoly.

The duty involves upon you to analyse the facts to see if such refusal is for the purpose and intent to create or maintain a monopoly and if you come to the conclusion such is the intent, then proceedings should be instituted under and by virtue of Section 8705, R. S. Mo. 1929, in our opinion.

Yours very truly,

APPROVED:

James L. HornBostel
Assistant Attorney-General

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General

JLH:EG

CITIES: Cities of the fourth class have a right to issue bonds for the purpose of building a municipal auditorium when the assent of two-thirds of the legal voters of such city voting at an election held for that purpose have assented thereto.

April 14, 1936.

H-16

FILED 86

Hon. H. L. Stolte
State Representative
Gasconade County
Hermann, Missouri

Dear Sir;

This will acknowledge receipt of your request of April 6th for an opinion, which reads as follows:

> "Will you please give me your opinion as to whether or not a city of the fourth class, incorporated presumably under a common charter, has the right to vote on a bond issue for the purpose of building a municipal auditorium?
>
> "The question arose as to whether we could build a municipal auditorium and we would like to be more certain about it."

Your attention is directed to Section 7030, R. S. Mo. 1929, relating to what bonds may be issued for by cities of the fourth class. It reads as follows:

> "Bonds may be issued for erection of purchase of public buildings, bridges, waterwords, electric light plants and ice plants, public parks, and other improvements, and for establishing and maintaining a fire department. The board of aldermen shall have power to borrow money and issue bonds for the payment thereof, within the limits prescribed by the Constitution, for the purpose of erecting waterworks, electric light works, public parks and

> ice plants,or acquire the same by purchase; also a city hall and other public buildings and improvements and for furnishing the same, and for the erection of public bridges across streams dividing counties, if located within one mile of its corporate limits, the expense of building said bridges to be borne in part by the counties, as provided for by Section 7903, R. S. 1929, but bonds for the purpose aforesaid shall not be issued until two-thirds (2/3) of the legal voters of such city, voting at an election held for that purpose, have assented thereto, in accordance with article 10, chapter 38, R. S. 1929. ****"

You will note from a careful reading of the above section of the statute that the board of aldermen shall have the power to borrow money and issue bonds within the limits prescribed by the Constitution for the erection of public buildings, and other improvements, provided that such bonds are issued in accordance with Article 10, Chapter 38, R. S. Mo. 1929. Pursuing our query further for the purpose of determining "within the limits prescribed by the Constitution", we find the following under Section 11, Article X of the Constitution of Missouri:

> "****For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes, and the rate allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the State, or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness: ****"

The further reading of said section discloses in part the rate of taxation for the purposes of issuing bonds, the proceeds of which will be used in erecting public buildings, as follows:

> "****in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; ****"

Your attention is further directed to Section 7217, R. S. Mo. 1929, relating to the incurring indebtedness by various cities, whether organized by special charter or under the general laws of the State. It reads as follows:

> "The various cities, towns and villages in this state, whether organized by special charter or under the general laws of the state, may contract a debt or debts in excess of the annual income and revenue for any such year, for any purpose authorized in the charter of such city, town or village, or by any general law of the state, upon the assent of twothirds of the legal voters of such city, town or village voting at an election held for that purpose: Provided, such indebtedness so to be contracted shall not, with the existing indebtedness of such city, town or village, exceed in the aggregate five per cent on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; and provided further, that the proper authorities of every such city, town or village incurring such indebtedness shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting same."

You will note that the contemplated indebtedness shall not, with the existing indebtedness, exceed in the aggregate five per cent of the value of the taxable property therein. This is ascertained by an assessment next preceding the last assessment for state and county purposes previous to the incurring of such indebtedness. It becomes obligatory upon the proper authorities of such city, town or village contemplating incurring the indebtedness before or at the time of so doing, to provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due. It becomes their further duty to establish a sinking fund for the payment of the principal within twenty years from the time of contracting the indebtedness.

Section 7651, R. S. Mo. 1929, relating to certain cities owning and acquiring public utilities, provides as follows:

> "Any city of the third or fourth class, and any town or village, and any city now organized or which may hereafter be organized and having a special charter, and which now has or may hereafter have less than thirty thousand inhabitants, shall have power to erect or to acquire, by purchase or otherwise, maintain and operate, **** public auditorium or convention hall, which are hereby declared public utilities, and such cities, towns or villages are hereby authorized and empowered to provide for the erection or extension of the same by the issue of bonds therefor, *****."

It is evident, from the above section of the statute, that a city of the fourth class is given the right to erect or acquire, by purchase or otherwise, maintain and operate, a public auditorium or convention ahll. It is further evident that in order to thus acquire the public utility, that the city is authorized and empowered to issue bonds.

In the case of Halbruegger vs. City of St. Louis, 262 S. W. l. c. 381, the court had before it for consideration the statute above quoted, and in passing upon the right of a city to erect or acquire a public auditorium or convention hall, the court said:

> "In this case there is also the fact that the Legislature has authorized all cities of the second class (Laws 1923, pp. 280, 281), and all cities, towns and villages, having less than 30,000 inhabitants, to erect or amquire 'a public auditorium or convention hall.' Section 9089, R. S. 1919. In the process of passing these acts the State Legislature necessarily determined that the erection or acquisition of such structures was a public purpose."

CONCLUSION.

In light of the above, it is the opinion of this department that a city of the fourth class has the right to build a municipal auditorium and a further right to issue bonds for the purpose of erecting said municipal auditorium in accordance with Article 10, Chapter 38, R. S. Mo. 1929.

Respectfully submitted,

Russell C. Stone

RUSSELL C. STONE
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney-General.

BOARD OF TRUSTEES: Woman may qualify as a member of the Board of Trustees of the Confederate Home of Missouri.

- - - -

The above requirements are:

(1) "shall be a citizen of the State of Missouri"

(2) "and more than thirty years of age,"

(3) "shall be a descendent of a soldier or sailor who shall have served in the army or navy of the Confederate States of America,"

(1) A woman may be a citizen of the State of Missouri. Webster's New International Dictionary, second edition, defines "citizen" as follows:

> "A member of a state; a person, native or naturalized, of either sex, who owes allegiance to a government, and is entitled to reciprocal protection from it;"

The Fourteenth Amendment, Section 1, of the United Constitution, defines "citizen" in this manner:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. * * * *"

(2) Anyone may qualify under this provision who shall be more than thirty years of age.

(3) A woman must be a descendent of a soldier or sailor. Webster's New International Dictionary, second edition, defines a "descendent" in these words:

> "One who descends, as offspring, however remotely;"

Therefore, from the foregoing it is the opinion of this department that a woman may qualify as a member of the Board of Directors of the Confederate Home of Missouri, if capable of fulfilling the requirements of Section 13928, supra.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

OWN:

ELECTIONS - Power to pass on right of person elected to State House of Representatives to be seated therein.

FILED
86

7-28

July 28, 1936.

Hon. Walter G. Stillwell,
Prosecuting Attorney of Marion County,
Hannibal, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of July 25th, 1936, such request being in the following terms:

"The opinion of your office is requested on the following question:

In 1931 Mary Sue Hamlin, wife of Roy Hamlin representative in the General Assembly from Marion County, moved to Lewis County Missouri for the purpose of actively managing a large farm which was owned in fee simple by Mrs. Hamlin. At the time of her removal from Marion County Mrs. Hamlin took her children with her and placed them in the schools of Lewis County. After residing in Lewis County for several months Mrs. Hamlin was appointed to the Monticello School Board, later elected to said Board and thereafter was elected President of the Board and now is serving in that capacity. She pays real estate and personal taxes in Lewis County. At the time of her removal from this County Mrs. Hamlin took all of her personal property and effects and did establish her domicile and residence in Lewis County in the homestead where she was born and reared. As your office knows Mr. Hamlin is a resident of Marion County.

Mrs. Hamlin is now running for the Democratic nomination for Representative of Lewis County and the question has been raised as to whether or not she is a resident of Marion or Lewis County and whether or not she can qualify for the Legislature if nominated and

elected.

> At the time Mrs. Hamlin moved to Lewis County it was her intention to establish her residence there and she has at all times voted there."

Your letter, in stating that Mrs. Hamlin has established her domicile and residence in Lewis County, eliminates any necessity of our passing on the question of whether such a domicile and residence was in fact established, and leaves as the only question for our consideration the question of whether, assuming Mrs. Hamlin is nominated and elected, she can qualify and take her seat in the State House of Representatives.

The Constitution of Missouri, Article IV, Section 17, provides in part that "each house * * * shall be sole judge of the qualifications, election and returns of its own members". Under the plain meaning of this language of the Constitution, the House of Representatives has the exclusive power to decide whether or not a person elected to it shall be seated. There are no reported Missouri cases construing the foregoing provision, but such a provision is a usual provision in state constitutions, and has been construed by the appellate courts of many states according to its plain meaning. People v. Mahan, 13 Mich. 481; State v. Gilmore, 20 Kans. 551 (1878); Corbett v. Naylor, 25 R. I. 520, 57 Atl. 303 (1904). And courts are without jurisdiction to assume the function of passing on the right of a person elected to a branch of the state legislature to be seated therein, where such a constitutional provision is in force. Allen v. Lelande, 164 Cal. 56, 127 Pac. 643 (1912); State ex rel O'Donnell v. Judges of Civil District Court, 40 La. Ann. 598, 4 So. 482.

In conclusion, it is our opinion that the Missouri State House of Representatives is a sole judge of the qualifications of its members, and that such House alone has the right to determine whether a person elected to it may take his seat therein.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CIRCUIT CLERK: Salary determined by Sec. 11786, Laws 1933, p. 369. Population of Marion County, even though it contains Court of Common Pleas, in which there is a Clerk, is determined by the entire population of the County.
RECORDER OF DEEDS: Compensation is amount of fees as set forth in Sec. 11804, R.S. Mo. 1929 and the limitation of the amount of fees he may retain is Sec. 11828, R.S. Mo. 1929.

September 17,1936.

9-18

FILED
86

Honorable Walter G. Stillwell,
Prosecuting Attorney,
Marion County,
Hannibal, Missouri.

Dear Mr. Stillwell:

This department is in receipt of your letter of September 12, which is as follows:

> "You no doubt recall that Thad Smith, former Clerk of the Circuit Court of this county and Ex-officio Recorder of Deeds, recently died. Soon after his death I telephoned you and expressed as my opinion that because of the separation of the two offices, as enacted by the legislature of 1933, that it would be necessary that two people be appointed; one as Clerk of the Circuit Court and the other as Recorder of Deeds. You will recall that you concurred with me in this opinion.
>
> "Soon after our conversation, Governor Park appointed Edwin Smith as Clerk of the Circuit Court and Mrs. Frances E. Johnson as Recorder of Deeds. The question now presents itself as to the salary and fees that are to be allowed each official. It is my opinion that the compensation of the Circuit Clerk is covered by Sections found on pages 369-372, Laws of Missouri, 1933.
>
> "I am a little confused, however, as to the compensation allowed the Recorder and can find no law for this situation except the regular Recorder's Fee statute in the 1929 Revised Statutes. You will note that that chapter segregating these two offices, which is found on pages 360-362, Laws of Missouri, 1933, makes no provision whatever for the compensation to the Recorder. I would appreciate the opinion of your office as to the salary or fees allowed

> the Circuit Clerk and also the Recorder of Deeds. In this connection your attention is called to the peculiar judicial set-up of Marion County, that is, that our Circuit Court at Palmyra is a Court of unlimited jurisdiction for all townships in the county save and except Mason and Miller. The Hannibal Court of Common Pleas, which comprises Mason and Miller Townships, is to a certain extent a Court of limited jurisdiction. Therefore, should the population in computing the salary and fees of the Circuit Court be Marion County as a whole or Marion County exclusive of Mason and Miller Townships?
>
> "I refer to the Hannibal Court of Common Pleas as being a court of limited jurisdiction, which it is in certain isolated and segregated matters such as appeal ffom the Workmen's Compensation Commission, appeal from Probate Court, and a few other instances, which must be taken directly to the Circuit Court of Palmyra. I am giving you this information so it can be taken into consideration when the opinion is written on these two specific questions."

I - Circuit Clerk

The compensation of the Circuit Clerk is fixed by Section 11786, Laws of Mo. 1933, p. 369. The last decennial census shows the population of Marion County to be more than 30,000 inhabitants; hence, the salary is $2500. The deputy and assistant circuit clerks' compensation is fixed by Section 11812, Laws of Mo. 1933, p. 371. We are therefore of the opinion that you are correct, as stated in your letter, that these sections govern the salary of the Circuit Clerk.

The manner of determining the population of any county in the state is found in Section 11808, Laws of Mo. 1933, p. 370, which is as follows:

> "The last previous decennial census of the United States shall be the basis for determining the population of

> any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

The fact that Marion County contains a Court of Common Pleas, which has concurrent jurisdiction of Mason and Miller Townships, presents the question as to whether or not the Circuit Clerk is entitled to have his salary computed on the basis of the entire population of Marion County or the population exclusive of Mason and Miller Townships, the Court of Common Pleas having its own clerk who officiates in that Court.

The Legislature has not seen fit to in any wise limit the manner of determining the population of any county as it affects salary and fees of county officials; hence, we can come to no other conclusion than that the words "shall be the basis for determining the population of any county in this state" in the absence of any exception to the statute, mean that the entire population of Marion County shall be considered in arriving at the compensation of the Circuit Clerk, and we accordingly so hold.

II - Recorder of Deeds

In 1933, the Legislature repealed a number of sections relating to the office of Recorder of Deeds and reenacted seven new sections relating thereto. As stated in your letter, no compensation in the form of salary was fixed for the Recorder of Deeds. It is therefore necessary that he receive his compensation in the form of fees and the main fee section is 11804, R.S. Mo. 1929, the other sections in which the Recorder exacts fees being mentioned in the specific statutes. The only limitation on the amount of fees the Recorder may retain is Section 11828, R.S. Mo. 1929, which provides:

> "The fees of no executive or ministerial officer of any county, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of five thousand dollars for any one year. The foregoing clause shall not apply to any county or city not within a county in this state now containing or which may hereafter contain one hundred thousand inhabitants, or more. After the first day of

> January, 1891, every such officer shall make return quarterly to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail and verifying the same by his affidavit; and for any statement or omission in such return contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

In the absence of any statute giving to the Recorder of Deeds a salary, or in the absence of any statute stating the amount of fees he may retain for himself, as in the case of the Circuit Clerk, we are of the opinion that the section of the statutes relating to fees to be charged by the Recorder of Deeds - Sec. 11804, R.S. Mo. 1929 - governs the compensation he shall receive in Marion County, the limitation on the amount being as provided in Section 11828, supra.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

ELECTION: Publication of general election notice in two newspapers in each county.

October 1, 1936. 19-1

FILED 88

Mr. Geo. E. Tedrick
Altamont, Missouri

Dear Sir:

This is to acknowledge your letter of September 28th, requesting this Department for an opinion. Your letter is as follows:

> "I am writing you for a little information. In regard to publishing the General Election Notice isn't it possible publishing it two or more papers in our county, if all four editors, or whatever the number of editors are. In that way every voter in the county will get to read it, if in two papers only a small portion of the voters get to see it.
>
> "Who care how many papers it is published in, the voters, every one of them are entitled to read the notice and of course every voter does not take the 'county seat' papers, but by publishing it in the 'little town' papers, then all voters would see it and they are entitled to see it.
>
> "I just wondered if the editors of the various papers could do that."

We take it from the above that you desire to know whether or not the general election notices may be published in more than two papers in each county in the State.

Section 10249, R. S. Mo. 1929, pertaining to the notice referred to in your letter, provides as follows:

> "At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election. Provided that no higher rates shall be paid per inch, than is provided by section 13773, chapter 114, R. S. 1929, as amended."

It will be seen from the above section that the "clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties within the county, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper." Which means, that in your county, if there is a Democratic and Republican newspaper, it must be published in both of them. In such case the law only requires the notice to be published in two newspapers in the county to be selected in accordance with the above section. While we can see no objection to publishing the notices in more than

two newspapers, the county court would not be authorized under the law to pay for more than the publications in two newspapers.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

CRH:EG

RECORDER'S FEES: Circuit Clerk and Ex-officio Recorder shall pay excess fees quarterly to county treasurer.

January 9, 1936.

FILED 89

Miss Stella Hall Thompson,
Circuit Clerk and Ex-officio Recorder,
Kingston, Missouri.

Dear Miss Thompson:

This will acknowledge receipt of your inquiry which is as follows:

> "Can you give me a ruling on what disposition to make with fees from Recorder's Office in counties where Circuit Clerks also serve as Recorder? I find no statute covering this and we are certainly not under bond to turn them over to the County General Revenue Fund.
>
> "I will appreciate it if I can get this before December 31st, as that is the date on which I make annual settlement with the County Court."

In 1933 the Legislature enacted a law relating to salaries and fees of Circuit Clerks, found in Laws of Missouri, 1933, page 369. Section 11786 thereof, among other things, provides:

> "Provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section."

Section 11814 of said laws, page 372, among other things, provides:

> "And quarterly such clerk shall pay into the county treasury the amount of any

> fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law. It shall be the duty of the county court to examine such quarterly report and to require of the prosecuting attorney to enforce payment of all fees therein shown to be unpaid in any manner now or hereafter provided by law * * *."

Section 11786 of said laws, page 369, specifies the amount of salary that the Clerk may receive in the respective counties.

Your inquiry does not state the population of your county, and as you make no inquiry as to the amount of your salary, we do not embody that phase in this opinion.

CONCLUSION

It is our opinion that the fees collected by the Circuit Clerk as Ex-officio Recorder which, when added to his fees collected as Circuit Clerk, are in excess of the amount of salary pertaining to that office as defined by Section 11786, supra, should be paid quarterly by such Clerk into the county treasury of your county.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

HIGHWAY: Abutting owner can build drain along unused part of highway.

May 8, 1936.

5/9

FILED 89

Honorable Vane C. Thurlo
Prosecuting Attorney
Linn County
Linneus, Missouri

Dear Sir:

We have received your letter of April 22, 1936, which reads as follows:

> "I respectfully request the opinion of your department upon the following proposition: The Metropolitan Life Insurance Company owns a large body of land in this County, and they desire to erect around this land a levy and drain the levied land by running an open ditch on the right-of-way of a public road for a distance of about sixty feet, the ditch to be an open ditch running on the right-of-way of the road, but not crossing the travelled portion of the road.
>
> "The Township Board is willing to permit the construction of this ditch if they have the authority. This ditch will empty into a creek upon which is maintained a County bridge, the mouth of the ditch to be on the road right-of-way, and the levy that the ditch drains will be constructed on the company's farm.
>
> "My question is, does the Township Board have the authority under the law to permit the construction and the maintenance of the ditch on the right-of-way, as the levy and the ditch will be erected and maintained for the sole benefit of the company in draining their farm, but it will, it is felt, be a benefit to the road,

inasmuch as it will assist in draining off overflow as well as surface water from the road proper."

It is a well settled rule in Missouri that the owner of land adjoining on a public highway, owns the fee to the center thereof, subject to an easement in the public.

57 Mo. 583; 86 Mo. 419; 135 Mo. 366.

Where this rule obtains it is as well settled that the owner of the abutting property may make such use of the land within the highway as will not interfere with its use for public travel.

15 Am. and Eng. Enc. Law (2d) Ed. p. 416; 29 C. J. p. 548; Elliott's Road and Street, Par. 876.1.

The use which the abutting owner may make of the highway includes the right to maintain ditches and drains for the benefit of his land, providing he maintains no nuisance in so doing, nor interferes with its use as a highway.

56 Mo. App. 599; 43 Mo. App. 176; 29 C. J. p. 550.

In Holm v. Montgomery, 62 Wash. 398 it was held that an abutting owner having the fee of the highway may use the untraveled portion as a ditch to carry water to his premises for irrigation purposes so long as he does not create a nuisance or interfere with public use of the way.

We have taken it from your letter that the ditch is run entirely along the property of the person who is to benefit by it. If it is to run along the abutting property of someone else, their permission must be obtained.

CONCLUSION.

It is, therefore, our conclusion that an abutting property owner can build a ditch along the unused part of the highway as a drain for his land.

APPROVED: Respectfully submitted

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

J. E. TAYLOR
Assistant Attorney General.

It is the duty of the State Old Age Assistance Board to obtain as much benefit as possible from the Federal Government and not to pay retroactive claims.

July 6, 1936

FILED
89

Honorable Allen M. Thompson, Commissioner
Old Age Assistance Division
Jefferson City, Missouri

Dear Sir:

We have received your letter of June 26, 1936, in which you request this department for an opinion on the following subject:

> "You are familiar with the Missouri Old Age Assistance Law pertaining to the payment of assistance. The Federal Government does not match retroactive grants except for the current quarter and the quarter immediately preceding the current quarter, In order that the State of Missouri may secure the largest possible sum of money from the Federal Government for the use of Old Age Assistance, it is our purpose to pay from the State Treasury only the retroactive grants that will receive Federal matching and let the grants for any months which do not r eceive Federal matching stand as an obligation of the state to be dealt with by the next session of the Legislature.
>
> May we have an opinion of your office as to whether or not there would be any legal objection to such a plan. "

We are not certain that we have a correct understanding of the following part of your request.

> "The Federal Government does not match retroactive grants except for the current quarter and the quarter immediately preceding the current quarter."

for the reason, as we understand it, if the Federal Government matches a preceding quarter to a current quarter and matches following quarters, there could not be another preceding quarter.

Furthermore, the Federal Act, U.S.C.A. Title 42, 1935, cumulative annual pocket part, page 87, provides that the method of cumputing and paying such amounts to the State, is that the Social Sucurity Board shall "prior to the beginning of each quarter, estimate the amount to be paid to the State for such quarter under * * * a report filed by the State containing its estimate of the total sum to be expended in such quarter." Since we do not find any authority in the Federal Act authorizing the Federal Board to allot or grant to the State money for a preceding quarter to the current quarter, we do not feel that this department should pass upon any action that the Federal Board has or may take with reference to its powers and duties.

If we have a proper understanding of your inquiry, it is that you desire an interpretation of the Old Age Assistance Act enacted by the 1935 General Assembly of Missouri, found at page 309,et,seq., relative to the authority of the State Board to pay old age assistance for the current quarter and following quarters in preference to paying the old age assistance from the time that the applicant's petition was received by the County Boards, if funds are insufficient to pay both.

The Old Age Assistance Law was enacted for the purpose of complying with the constitutional amendment, which was voted by the people of Missouri on November 8, 1932. The amendment (Section 1) provides:

> "That Article IV, Section 47 of the Constitution of Missouri be, and the same is hereby amended by adding at the end of said section the following words: 'Provided further, that nothing in this Constitution contained shall be construed as prohibiting the General Assembly from granting or authorizing the granting of, pensions to persons over seventy years of age, who are incapacitated from earning

> a livelihood and are without means of support, as may be provided and regulated by law.'"

The Legislature, for the purpose of carrying out the wishes of the people as expressed by the constitutional amendment, supra, enacted the Old Age Assistance Law, (Laws of Missouri, 1935, pp. 309, et seq.) which became effective July 27, 1936. The sections of the law which are pertinent to your inquiry are as follows:

Section 4 of said Act, Laws of Missouri, page 309, which provides:

> "Subject to the provisions and under the restrictions contained in this Act, every aged person who has no income or an income inadequate to provide a reasonable subsistence compatible with decency and health * * * "

Section 14, page 312, which provides:

> "The assistance, if allowed, shall commence on the first day of the calendar month, following that on which the petition was received by the county board."

Section 24, pages 313 and 314, which provides:

> "The State Board shall prepare an Old Age Assistance Roll upon which shall be placed the names of all those granted and then entitled to have Old Age Assistance Certificates. The State Board shall certify to the State Auditor the names of all those persons on the Old Age Assistance Roll, and the State Auditor shall supply to all person whose names then appear on the State Old Age Assistance Roll suitable blank forms for monthly or quarterly requisitions, as the case may be, which requisitions shall state among other things that the requisitionor is the recipient of the assistance

> personally and that he or she has the free and full use thereof, and that the same is devoted exclusively to his or her needs, giving his or her present address; and each applicant shall forward each requisition for assistance last accrued to the State Auditor who sha ll draw a warrant in favor of such applicant upon the State Treasurer for any monies in the treasury available therefor * * * "

Section 27, page 314, which provides:

> "* * * and the State Board shall cooperate with the Federal Government in the administration of this Act, furnish the Federal Government with any and all information desired relative to the payment of pensions or old age assistance and the cost of administration of this Act, and do any and all other things which may be necessary or required so that the State of Missouri may secure the full benefit of any Act of Congress providing for payment of all or part of the costs of carrying out the provisions of this act."

In construing the above sections it is necessary to keep in mind the fundamental rules of construction of statutes, and that all must be read together to ascertain the purpose and intention of the Legislature.

In 59 Corpus Juris, page 993, paragraph 594, it is said:

> "In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies * * *, and the intent as deduced from th whole will prevail over that of a particular part considered separately."

And at page 995, paragraph 595:

> "* * * It is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable to reconcile the different provisions so as to make them consistent, harmonious and sensible."

And in Lewis-Sutherland's Statutory Construction, Vol. 2, 2d Ed., page 693, it is stated:

> "'Intent is the spirit which gives life to a legislative enactment.' 'In construing statutes the proper course is to start out and follow the true intent of the Legislature and to adopt the sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the Legislature.'"

And we find the rule stated succinctly in 25 Ruling Case Law, page 1006, paragraph 247, as follows:

> "Obviously, in order that effect may be given to <u>every part of an Act</u> in accordance with the legislative intent, <u>all the language of the act must be considered and</u> brought into accord."

The Supreme Court of Missouri, in Logan v. State Highway Commission, 330 Mo. 1213, l. c. 1219, said:

> "The two sections of the statutes should be read and construed together. In construing a statute the court must, if possible, give effect to the whole and every part thereof, provided the interpretation reached is reasonable and not in conflict with the legislative intent."

From a reading of the whole act it is evident that it was the intention of the Legislature to provide assistance for every person qualifying under the provisions of the Act. The Legislature, for the purpose of making the Act effective, appropriated two and one-half million dollars ($2,500,000), Section 46-H-2, page 179, Laws of Missouri, 1935, and the sum of two and one-half million dollars ($2,500,000) was appropriated out of any funds granted to the State of Missouri by the Federal Government for old age assistance during the years 1935 and 1936, Section 46-H-3, which is a total appropriation of five million dollars ($5,000,000) for said years, for old age assistance.

Section 14 of the Act unquestionably fixes the time when the assistance, if allowed an applicant by the County Board, shall commence, which is on the first day of the month following the time the petition was received by the County Board. The obligation of the State to the qualified applicant begins at such time. Whether or not the State meets the obligation and pays the qualified applicant, depends upon the action of the Legislature in providing funds therefor. The time that the Federal obligation and the State obligation begin are not concurrent. The Federal participation in matching the payments made by the State to a qualified applicant begins the preceding quarter to a current quarter

The question is presented, what is the power and duty of the State Board in administering the Act in view of the State and Federal Acts? Calling your attention again to Section 27, supra, you will note that the section makes it mandatory for the State Board to cooperate with the Federal Government, "and do any and all other things which may be necessary or required so that the State of Missouri may secure the full benefit of any act of Congress providing for payment of all or part of the cost of carrying out the provisions of this Act."

It is certain and plain that it was the intention of the Legislature that the State Board should do everything necessary to obtain all the benefits possible from the Federal Government in carrying out the purposes of the Old Age Assistance Act of Missouri. It was not the intention of the Legislature of Missouri that assistance be paid out of the State funds exclusively, but should be paid from Federal and State funds.

It is not mandatory for the State Board to pay retroactive obligations. The mandatory provision in Section 14 applies only to the time when the obligation begins. For the State Board to pay out State funds in payment of retroactive claims, it will deprive thousands of eligible persons from receiving what they are entitled to for the current and following quarters and in administering the Missouri Act, it is the imperative duty of the State Board to obtain the full benefit of Federal funds that may be had by matching dollar for dollar.

Section 24 of the Act also supports the view that it was the intention of the Legislature that State funds should only be paid to eligible persons when such funds are matched by the Federal Government. The section contains the following language:

> "* * * The State Board shall certify to the State Auditor the names of all those persons on the Old Age Assistance Roll, and the State Auditor shall supply * * * suitable blank forms for monthly or quarterly requisitions, * * * and each applicant shall forward each requisition for assistance last accrued to the State Auditor."

The above language is clear that it was the purpose of the Legislature that the requisitions and the payments thereof should be for a current quarter, that is, for the quarter which the State fund would be matched by the Federal fund.

Bearing in mind it was the intention of the people as expressed by the constitutional amendment, supra, that every person over seventy years of age who is "incapacitated from earning a livelihood and are without means of support" should have assistance, the Legislature intended to provide assistance for every such person and the conclusion is inescapable that it is the plain, mandatory duty of the Old Age Assistance Board to place the names of such persons on the Old Age Assistance Roll, and the State Board has no authority to arbitrarily select and pay a certain group, or a certain number of those who are incapacitated and without means of support and refuse payment to others so situated.

Since it was not the intention of the Legislature that the State Board should have discretionary power to select and pay a given number of eligible persons from the date their petitions were filed with the county boards and refuse payments to others, the State Board should pay all persons eligible to receive assistance under the Act fixing the amount that each should receive as authorized by Section 5 of the Act, which provides "with due regard to the conditions in each case", also taking cognizance of the amount of funds available therefor.

The unexpended funds (appropriations) of the State to pay old age assistance amount to $1,425,053 .60, less the amounts necessary for funeral expenses, approximating $50,000, which are not matched by Federal funds, will leave a balance of $1,375,000, out of State funds available for old age assistance. If the rules and regulations of the Federal Social Security Board are com-

plied with, the Federal Government will match the State's available funds dollar for dollar, which will make a total of $2,750,000. Thus, the State of Missouri would have available $2,750,000 for the paying of old age assistance in monthly payments, which payments must be in such amounts as will continue the payments until December 31, 1936.

CONCLUSION

It is, therefore, our opinion that the State Board should administer the Old Age Assistance Law of Missouri so as to obtain the full benefit of Federal funds to match the State's payments. It is our further opinion that the State Board should not pay retroactive payments if such payments would result in the non-matching of Federal funds, but the State Board should place on the Old Age Assistance Roll every person who is eligible to receive old age assistance.

Respectfully submitted,

Assistant Attorney General

Attorney General

CRH-RM/AH

NEPOTISM: Public officer receiving personal service from daughter does not violate Section 13, Article XIV, where daughter is not appointed to an official position.

September 28, 1936

9-30

FILED
89

Honorable W. R. Tilson
Circuit Clerk
Nodaway County
Maryville, Missouri

Dear Sir:

I am in receipt of your letter of September 23, 1936, directed to General McKittrick, requesting information on the following matter:

> "Am taking the liberty of writing you for some information regarding the Nepotism law?
>
> Can I have my daughter who has been living with us for 3 or 4 years do my work in my office where there is no appointment and no compensation given.
>
> As my office is on a fee basis and am allowed only one deputy, which is paid by the County, and the fees do not warrant me in hiring extra help but there are times that I would like to take a few days vacation which I have not done since this office was put on a fee basis, my daughter would gladly help the Deputy in my work without any compensation whatsoever, but I have been told that she could not even do any work in my office whether there was any appointment or compensation to her, which she would not expect, it would be a great favor to me if I was allowed to let her do my work in routine matters so I could take a few days from the office, but do not want to violate any of the Statutes regarding the law.

> There would be no appointment made as to deputy or any compensation and if the office would permit me to be able to pay for extra help when I wanted a vacation would pay for same.
>
> I, would be pleased to hear from you soon as I would like a few days off soon, my daughter is competent for any work in my office and the public would not suffer for the proper work done in my office. I do not want to violate any of the provisions of the law."

Sometime ago we had occasion to pass upon the issue presented by your communication as the same applied to the office of County Collector and on that occasion we issued an opinion, dated October 4, 1933, directed to Mr. Sam M. McKay, Prosecuting Attorney, DeSoto, Missouri, wherein we concluded as follows:

> "It is therefore the opinion of this Department that the Collector of your county is not guilty of violating Section 13 of Article XIV by permitting his daughters to render to him personal service where the daughters are not holding an official position and are not, as officials, rendering service to the State."

There are no facts which distinguish your request from the situation presented in the opinion to Mr. McKay. We are therefore forwarding you a copy of Mr. McKay's opinion with the suggestion that the opinion properly describes the law as applied to your case and that under the circumstances outlined you would not be guilty of violating Section 13 of Article 14 of the Constitution of Missouri.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

DRAINAGE DISTRICTS--County Court without authority to abate penalties.

TAXATION----------County Court without authority to abate drainage tax penalties.

October 17, 1936 10-20

FILED 89

Honorable S. S. Thompson
Presiding Judge
New Madrid County
New Madrid, Missouri

Dear Sir:

This office is in receipt of your request for an opinion upon the following matter:

> "We are asking your opinion on the following proposition with reference to drainage districts organized under the County Courts. During the years 1934 and 1935, we made application to the Reconstruction Finance Corporation to refinance some ten or twelve Drainage Districts in New Madrid County, Missouri. The tax in these Districts were excessive, and we were unable to make collections to meet our interest obligations, and had nothing to apply on the principal. Consequently the Districts were very much in default, and the tax became delinquent for several years. The landowners were advised by the Court that efforts were being made to refinance the Districts, consequently they failed to pay their taxes, due to the fact that if they were refinanced, a compromise would be forthcoming. We were successful in some of the Districts, and succeeded in obtaining a cut of 50% of the original outstanding indebtedness. In some cases a judgment had to be taken to keep some of the taxes from being outlawed. Since this time we find that we will be unable to refinance certain of the districts, and due to the fact that the landowners were waiting to see if the Districts could be refinanced, for which they could not be blamed, in which case they would have saved a great deal of money. Therefore we feel that the interest on the taxes should be

abated. Therefore, we desire to ask, in your opinion, if the County Courts have a right to abate interest penalties on Drainage Taxes."

I.

County Court has no power to abate penalties on drainage taxes.

This office on August 20, 1935, had occasion to direct an opinion to Hon. G. R. Breidenstein, Prosecuting Attorney of Clark County, wherein was presented the authority of the Board of Supervisors to authorize the County Collector to remit the penalties accruing upon delinquent drainage taxes. We are herewith enclosing to you a copy of that opinion. You will note that authorities are there set out to the effect that no board may remit penalties on taxes unless specifically authorized by statute. These authorities are applicable to County Courts as well as to Board of Supervisors. In this connection it should be remembered that county courts are not the general agents of the county but have only such powers and authority as are authorized by statute. In the case of Sturgeon vs. Hampton, 88 Mo. 203, 213, it is stated:

> "The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void."

The management of Drainage Districts is placed in a Board of Supervisors, which board, under the statute, has the management and control of the district, but few duties are imposed upon the county court relative to drainage districts. None of these duties comprehend any such act as abating penalties on drainage taxes. No statute is to be found from which this power could be implied. There being a total lack of authority in the County Court our answer must be in the negative.

CONCLUSION

It is therefore the opinion of this office that the County Court of New Madrid County is without authority to abate interest on delinquent drainage taxes.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM
Enclosure.

OLD AGE ASSISTANCE:) County Courts do not have authority to
) contribute to the support of an associa-
COUNTY COURTS:) tion of Old Age Assistance Boards

12-10

December 10, 1936.

FILED
89

Colonel Allen M. Thompson
Commissioner
Old Age Assistance Division
Jefferson City, Missouri

Dear Mr. Thompson:

This will acknowledge receipt of your letter of recent date requesting an opinion from this office which reads as follows:

> "We have an inquiry from a member of one of our County Old Age Assistance Boards, seeking information relative to the justification of his county court's subscribing $25.00 to the support of an organization to be known as the Missouri Association of Old Age Assistance Boards.
>
> "We have had numerous requests, and I would like an opinion from you relative to the information which I should give in replying to them."

Section 3 of the Old Age Assistance Act, Laws of Missouri, 1935, page 309, provides that in every county there shall be established a county old age assistance board to consist of three persons to be appointed by the County Court. The members of the county board serve without compensation except the necessary expenses incurred in the performance of their duties are paid to them.

There is no provision found in the Act or elsewhere requiring said county boards to form an association of Old Age Assistance Boards and there is, of course, no

provision authorizing the county courts to contribute $25.00 or any other amount to the support of such an organization.

The powers of the county court are limited and defined by law. A county court only has such authority as is expressly granted to them or which can be implied to carry out authority expressly granted.

In the case of King v. Maries County, 249 S. W. 418, the Court at loc. cit. 420 said:

> "It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute. Butler v. Sullivan County, 108 Mo. 630, 18 S. W. 1142; Sturgeon v. Hampton, 88 Mo. 203; Bayless v. Gibbs, 251 Mo. 492, 158 S. W. 590; Steines v. Franklin County, 48 Mo. 167, 8 Am. Rep. 87. This is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out or make effectual the purposes of the authority expressly granted. Sheidley v. Lynch, 95 Mo. 487, 8 S. W. 434; Walker v. Linn County, 72 Mo. 650; State ex rel. Bybee v. Hackmann, 276 Mo. 110, 207 S. W. 64.
>
> "In this case there is no claim that there was any statute which expressly gave to the county court power to employ the plaintiff in the capacity here involved. If such power existed at all, it must be looked for among those powers which can be implied only as being essential to effectuate the purpose manifested in an express power or duty, conferred, or imposed upon the county court by statute. If such a power existed, it must be one related to the subject with which the court was attempting to deal, and necessary to be exercised by the court in the discharge of a duty imposed by law upon that body. ****"

In view of the provisions of Section 47 of Article IV. of the Constitution of Missouri, which provides in part, "The General Assembly shall have no power to authorize any county, city, town, or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company:" we doubt if the Legislature could lawfully authorize the county courts to contribute to the support of an association of old age assistance boards. However, since the Legislature has not authorized the county courts to do so, it is not necessary to decide this question.

CONCLUSION.

In view of the above, it is the opinion of this department that a county court does not have the authority to subscribe $25.00 dr any other sum to the support of an association of Old Age Assistance Boards.

Respectfully submitted,

J. E. TAYLOR
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/afj

ELECTIONS: Judges of election should be selected or approved by entire central county committee.

September 24, 1936. 9-25

FILED 93

Mrs. E. W. Walker,
Chairman Phelps Co. Central Committee,
Rolla, Missouri.

Dear Madam:

You recently submitted to this department the following inquiry:

> " * * * What I would like to know is this: whether each township committeeman and committeewoman shall select the judges or whether if there is any misunderstanding, whether the whole committee must approve of all the judges. In other words, can a township committeeman or committeewoman compel the appointment of judges that they may select whether the majority of the committee approve them or not?"

Section 10209, R.S. Mo. 1929 provides for the appointment of persons to serve as judges of election, the pertinent part of which is as follows:

> "All judges of elections, appointed under the provisions of this article shall be selected by the county court from a list of persons furnished said court in the form and manner following: The political party that polled the largest number of votes at the last preceding general election and the political party that polled the next largest vote at said election shall, each, through its

> central committee, furnish to said county court at least fifteen days before the election, a list of names of persons qualified by law to serve as judges of election, double the number required for judges of said election, from which said list said county court shall, at least ten days before the election herein provided for, select and appoint the number of judges required to hold said election, taking one-half of the judges so appointed from each of said lists: * * * "

The statute uses the words "through its central committee, furnish to said county court at least fifteen days before the election, a list of names of persons qualified by law to serve as judges of election." If each township committeeman and committeewoman select their proportionate number of judges from their respective townships, we think it is proper, but because the statute states "through its central committee", which must necessarily include all members of the committee, we think the committee as a whole must approve of the judges selected by the committeemen and committeewomen in their respective townships.

For the same reason we are of the opinion that a township committeeman or committeewoman could not compel the appointment of any judge. It is a matter for a majority of the committeemen to approve. In many counties the chairman of the respective party committees selects the judges, but under the provisions of Section 10209, supra, the entire committee has a voice in the matter, and the names of the judges selected should be concurred in by the committee as a whole.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COUNTY COURT: Cannot make gift to deputy sheriff injured in line of duty.

January 23, 1936.

FILED 24

Hon. H. Glenn Weber,
Prosecuting Attorney,
Jefferson County,
Hillsboro, Missouri.

Dear Sir:

This department is in receipt of your letter of January 13 wherein you make the following inquiry:

> "The County Court of Jefferson County, Missouri would like an opinion on the following question: Can the County Court make a gratuity to a deputy sheriff injured in the line of duty, where no legal liability exists against the County?
>
> "It seems that the Court feels a moral obligation to assist in some degree in the payment of doctor and hospital bills, but the Clerk will not issue the warrant in compliance with the Court order without a favorable opinion from your office."

If the County Court has the power and authority to make the donation or gift mentioned in your letter, it must be found in the Constitution or statutes prescribing the duties and powers of the county court, either expressly or impliedly. The section of the Constitution of the State of Missouri creating county courts is 36, Article VI, which is as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law.

> The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

The general powers of county courts are discussed in the case of Knox County v. Hunolt, 110 Mo. 67, wherein the Court said (l.c. 74-75):

> "Our county courts and the judges thereof perform many duties, some of which are judicial, others quasi-judicial, and others purely ministerial. It has been held that members of that court act ministerially in causing a suit to be brought in the name of the county to the use of the township school fund. Washington Co. v. Boyd, 64 Mo. 179. So directing warrants to be issued on different funds in payment of debts is a ministerial, not judicial, act.
>
> "It is a well-settled rule that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do the act, he is liable in damages at the suit of a person injured. In such cases a mistake as to his duty and an honest intention is no defense. Amy v. Supervisors, 11 Wall. 136; Ins. Co. v. Leland, 90 Mo. 177; Mechem on Officers, sec. 664.
>
> "But where the public officer is by law vested with discretionary ministerial powers, and he acts within the scope of his authority, he is not liable in damages for an error in judgment, unless guilty of corruption or a wilful violation of the law. He is not liable for an honest mistake. This principle has been asserted by this court under a variety of circumstances. Reed v. Conway, 20 Mo. 23; Pike v. Megoun, 44 Mo. 492; McCutchen v.

> Windsor, 55 Mo. 149; 48 Mo. 254;
> Edwards v. Ferguson, 73 Mo. 686;
> Washington Co. v. Boyd, 64 Mo.
> 179."

The powers of the county court are purely statutory, as was said in the case of Bayless v. Gibbs, 251 Mo. 492:

> "County courts are not general agents of their counties. They are courts of limited jurisdictions, with powers defined and limited by the statutes, which constitute their warrant of authority, and when they act outside of or in excess of their statutory authority, their acts are null and void. * * *"

Again, in the case of Blades v. Hawkins, 240 Mo. 187, the Court said:

> " * * * While it is true the law is strict in limiting the authority of these courts, it never has been held that they haveno authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

In the case of King v. Maries County, 297 Mo. 488, the decision respecting the power of a county court is in substance as follows:

> "County courts are not the general agents of the counties, or the State, their powers being limited and defined by law and having only such authority as is expressly granted them by statute. The rule that county courts have only such authority as is expressly granted by statute is qualified by the rule that the express grant of power carries with it such implied powers as are necessary to carry out

> and make effectual the purposes of the authority expressly granted."

The Legislature has seen fit to pass severe criminal statutes affecting members of the court. Section 9987, R.S. Mo. 1929, provides:

> "Any county court or judge thereof, or county treasurer, or county clerk, or other county officer, who shall order the payment of any money, draw any warrant or pay over any money for any purpose other than the specific purpose for which the same was assessed, levied and collected, or shall in any way or manner attempt so to do, shall be adjudged guilty of a misdemeanor, and on conviction thereof shall be punished as provided in section 9869."

Section 4091, R.S. Mo. 1929 provides:

> "If any member of any town or city council, or of any county court or commission or body charged with the administration or management of the affairs of any county, or any executive officer or member of any executive department of any city, town or county in this state, or any member of any board or commission charged with the administration or management of any charity or fund of a public nature, by whatever name the same may be called, shall knowingly and without authority of law vote for the appropriation, disposition or disbursement of any money or property belonging to any such city, town, county, charity or fund, or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, appropriated and collected, or authorized to be collected by law, or shall knowingly aid, devise or promote the appropria-

> tion, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, and such illegal appropriation, disbursement or disposition be in fact effected, every person so offending against the provisions of this section shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; * * *"

CONCLUSION

We have searched the statutes diligently regarding powers and duties of the county court and cannot locate any statute which gives the county court authority to make the donation or gratuity to the unfortunate deputy who was injured in line of duty, either expressly or impliedly, however commendable the attitude of the members of the county court may be.

We further fortify our conclusion by reminding you of the County Budget Act (Laws of Mo. 1933, pp 340-346) wherein expenditures of the county are classified in six different classes, five of which are definite as to the nature of the expenditures, the sixth being a class which can only be resorted to after the other five classes have been provided for, their priority having been sacredly preserved and there being no outstanding warrants of previous years in existence. Thus it may be said that the existence of the County Budget Act is an additional reason why the county court cannot make the donation, and the last paragraph of Section 8 thereof (Laws of Mo. 1933, p. 346) subjects the officer issuing the warrant to an action upon his official bond.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COUNTY WARRANTS: (1) County officer is not permitted to buy or speculate in county warrants of any class; (2) county officer is entitled to interest on county warrant from date of presentation to date of payment; (3) county officer cannot have warrants issued to him, protested to himself and mail his check or cash to state hospital; (4) accounts for patients in state hospitals are paid by warrants made out to treasurer of hospital.

March 5, 1936.

3-9

FILED
94

Hon. H. Glenn Weber,
Prosecuting Attorney,
Jefferson County,
Hillsboro, Missouri.

Dear Sir:

This department is in receipt of your letter of February 25 requesting an opinion as to several questions in connection with officers speculating in county warrants. The first portion of your letter is as follows:

> "Publicity recently given the cases of George M. Barham, sheriff and R. Kip Briney, Treasurer-Collector, respectively of Stoddard County, have occasioned considerable inquiry in this county as to the exact and lawful method of handling county warrants, and prompts me to seek rulings from you on the following questions which have arisen:"

(For convenience we shall attempt to answer your questions numerically as contained in your letter)

I

> "Is a county officer permitted to purchase for investment any county warrants? If so, what class of warrants are permitted?"

Section 3955, R.S. Mo. 1929 relates to the purchasing, buying, trading for, any fee or warrant, either directly or indirectly, by clerks, deputies and officers of any court; said section is as follows:

> "It shall be unlawful for the clerk of any court, or his deputy, or any person in his employ, or any person for him, or any other officer of any court, to buy or purchase, or trade for, directly or indirectly, any fee taxed or to be taxed as costs in the court of which he is clerk or officer, or of any other court in this state, or any county warrant, at less than par value, which may be by law due or become due to any person by or through any such court; and it shall be unlawful for any county clerk, circuit clerk, recorder, or any other officer of any court, or his deputy, or any person in his employ, to charge, collect or receive less fee for his services than is provided by law."

Section 4094, R.S. Mo. 1929 relates to officers speculating in county warrants, and is as follows:

> "Every clerk of a court of record, sheriff, marshal, constable, collector of public revenue, or deputy of any such officer, or a judge of a county court, prosecuting attorney or county treasurer, who shall traffic for or purchase at less than the par value or speculate in any county warrant issued by order of the county court of his county, or in any claim or demand held against such county, shall be adjudged guilty of a misdemeanor, and shall, upon conviction, be punished by fine not less than twenty nor more than fifty dollars."

Your question contains the words "purchase for investment"--Section 3955, supra, uses the words "or any county warrant, at less than par value", while Section 4094, supra uses the words "who shall traffic for or purchase at less than par value or speculate in any county warrant". We are unable to locate any decision wherein prosecutions have been conducted under these sections, except in the case of State v. Wilson, 130 Mo. App. 151, the court does not define the elements of the crime but holds that the evidence was insufficient to convict and for that reason alone reversed the

case.

In the case of State ex rel. v. Seibert, 130 Mo. 202, the question of a mandamus against the State Auditor to compel him to audit certain costs in a case was involved. The court held that a county officer could not maintain an action as an assignee because said county officer could not validly purchase any part of the fees. The court said (l.c. 221-222):

> "An additional reason occurs for the rejection of the claim in question. It stands conceded on the pleadings and record herein, 'that J.L. Newhouse, the prosecuting attorney of Laclede county, is an interested party in said fees.' Now, when did that interest accrue? Was it prior or subsequent to his election as prosecuting attorney? We can take judicial notice of who were elected officers at the general election in 1892, and such notice embraces those who were elected to various official positions in Laclede County in that year. Among that number is J.L. Newhouse, then elected prosecuting attorney. 1 Greenl. Ev. (14 Ed.),.sec. 6, and cases cited; Himmelmann v. Headley, 44 Cal. 213; Ragland v. Wynn's Adm'r., 37 Ala. 32; Wade, Notice (2 Ed.) sec. 1412. And where the judicial memory is at fault, it may resort to documents of reference.' 1 Greenl., supra. Turning to one of these, we find that J.L. Newhouse was elected prosecuting attorney at the general election in that year. Lesueur's Manual, 1893-4, 152.
>
> "Under the public statute which will also be judicially noticed, he entered on the duties of his office on the first day of January next after his election. R.S. 1899, sec. 632. Turning then to the alleged supplemental fee bill, we find that a portion of the costs or fees therein mentioned accrued at the January term, 1893. And as the answer of relators' alleges that they are the owners of all the fees in question, it would seem that under the provisions of section 3751, Revised Statutes, 1889, Newhouse could not validly purchase any portion of the fees which accrued after his induction into

> office. As to that portion, certainly no mandamus should lie so far as he is concerned, because mandamus requires the doing of a specific thing, something which can neither be diminished, halved, quartered, nor otherwise subdivided. Besides, it was the duty of relators, especially after making that fee bill a part of their answer, to make it plain that none of their number was incompetent to become a purchaser or co-assignee of the fee bill."

Sections 3955 and 4094, supra, have remained on our statute books unchanged for a number of years, and it is our opinion that when the Legislature passed the two statutes, it had in mind to prevent the temptation and the possibility of fraud and corruption on the part of county officers by virtue of their positions, and that it was the purpose of the Legislature to prohibit a county officer from in any wise purchasing or becoming the assignee of a county warrant. It is therefore the opinion of this department that no county officer can buy, traffic in, speculate, invest in, or become in any wise, either directly or indirectly, interested in any class of county warrants during his term of office.

II

> "May he retain his individual salary warrant and have same protested to him?"

We find nothing in the statutes which would prevent an individual from using or disposing of his salary warrant as he sees fit. Section 12171, R.S. Mo. 1929 relates to the presentation of warrants, and is as follows:

> "No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant and shall date and subscribe the same."

In the case of Skinner v. Platte County, 22 Mo. l.c. 438, the Court said:

> "The question here is, will an allowance against a county in favor of an individual bear interest before the warrant against the county has been presented to the county treasurer for payment, and the treasurer's endorsement thereon, showing that payment was not made because there were no funds in the treasury to pay the demand? We think not. In order to draw interest, the warrant for the allowance must be made out and presented for payment to the treasurer; if he has funds to pay with, he pays the warrant without interest; if he has no funds to pay with, 'he shall so certify on the back of the warrant, date and subscribe the same.' (R.C. 1845, p. 311, sec. 6) From this date the warrant will bear interest. Here, the plaintiffs claimed their demand against the county of Platte in 1851; the county court allowed them four hundred dollars; they were dissatisfied with the court for allowing no more, and refused to accept a warrant for the sum thus allowed them. In March, 1855, they moved the county court to grant them a warrant for the said allowance of $400, together with interest thereon from the date of said allowance. This the court refused to do, so far only as respected the interest. The plaintiffs appealed to the Circuit Court; that court sustained the county court, deciding that plaintiffs were not entitled to interest. The plaintiffs moved for a new trial, and being overruled, they excepted, and bring the case here."

In view of the above decision, it is our opinion that the individual warrant of a county officer may be presented, and if there are not sufficient funds to pay it, he is entitled to interest from the date of presentation, the same as any other holder of a warrant.

III

"Is it lawful for a county officer desiring county warrants for investment, to have its Class 1 warrants (hospital and eleemosynary) issued to him, protested to himself and in turn mail the hospital his cash or check to cover the account? Would the county court or county clerk sanctioning such procedure be legally liable and if so, to what extent?"

In view of our conclusion under Part I of this opinion and the authorities therein cited, it is the opinion of this department that no county officer may have warrants issued to him under Class 1 of the County Budget Act, protested to himself and in turn mail the state hospitals his check or cash to cover the account. This, we deem to be a flagrant violation of Sec. 4094, supra, and what we have said under Part I would apply to this question too.

Also, Section 12170, R.S. Mo. 1929 provides:

"Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, * * * "

It is clear that this section means that only persons who are legally entitled to have claims against the county allowed may draw the warrants.

It is our opinion that if the county court or the county clerk shall sanction or participate in such procedure, knowing at the time that it is illegal, such officers may become liable to prosecution under Sections 4094 and 3955, supra.

IV

"Is there any regular lawfully recognized method of procedure in regard to the issuance and payment of Class 1 warrants? Should they not either be issued to the party presenting statement for payment, or to the county treasurer, sent to the latter's office with copy of original statement attached or information showing who is to receive payment for the warrant?"

Section 8636, R.S. Mo. 1929 was repealed by the Legislature in 1935 and a new section enacted, which now reads as follows (Laws of Mo. 1935, p. 388):

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars ($6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

The original section contained this provision: "And state hospitals are hereby expressly prohibited from receiving any county warrant in payment of any such sum as may be due by this section." The new section, you will note, contains no such provision.

Section 8642, R.S. Mo. 1929 provides:

> "The superintendent shall, under the direction of the managers, cause, once in every six months, to be made out and forwarded to any county court which may send to a state hospital an insane poor person, an exact account

> of the sum due and owing by such court on account of such insane person. Said court, at its first session thereafter, shall proceed to allow, and cause to be paid over to the treasurer of such state hospital, the amount of said account."

Under the terms of Section 8642, supra, when accounts are received by the county court for individual patients confined in state hospitals, it is their duty to allow the amount and to pay the same to the treasurer of the hospital, and it is therefore our opinion that it is the duty of the clerk to make out the warrant to the treasurer of the hospital.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

TAXATION: Right of possession and rent to redemption period.

March 10, 1936. 3-11

FILED 94

Hon. H. Glenn Weber
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Weber:

Your communication of recent date is acknowledged wherein you request an opinion on the following matter:

> "Considerable question has arisen on the rent problem in connection with sale of delinquent property under section 9954a of the 1933 Act.
>
> When, if ever, in your opinion must the owner of a homestead begin to pay rent to a purchaser at a tax sale under the above mentioned section?
>
> And, when must the owner of a tract, not a homestead, begin to pay rent on the tract to the purchaser at a tax sale?
>
> The section mentioned seems somewhat ambiguous, especially in the event of a sale of a homestead, and your early opinion on the rent question will be greatly appreciated."

Section 9954a, page 434, Laws of Missouri 1933, provides in part as follows:

> "The purchaser of any tract or lot of land at sale for delinquent taxes, homesteads excepted, shall at any time after one year from the date of sale be entitled to the immediate possession of the premises so purchased during the redemption period provided for in this act, unless sooner redeemed; provided however, any owner or occupant of any tract or lot of land purchased may retain possession of said premises by making a written assignment of, or agreement to pay, rent certain or estimated to accrue during such redemption period or so much thereof as shall be sufficient to discharge the bid of the purchaser with interest thereon as provided in the certificate of purchase.* * * *"

By the specific provisions of the first two lines of the above section it will be noted that homesteads are "excepted" from the provisions of that part of the section. This can mean but one thing, to-wit, that if the certificate of purchase covers a homestead the holder is not entitled to possession during the redemption period and consequently the owner of the land is required to pay no rent during the redemption period. So much for the law as it applies to homesteads.

In the event a certificate of purchase covers land which is not the homestead of the taxpayer the provisions of Section 9954a heretofore referred to are applicable, to-wit, after one year from the date of the sale the holder of the certificate may demand and obtain possession of the land covered by the certificate. If the holder of the certificate of purchase demands possession of the premises at any time after one year from the date of the sale the owner of the land may then enter into an agreement with the holder of the certificate of purchase to pay said holder the estimated rent to accrue or may make an assignment of the rent which is to accrue during the balance of the redemption period and thus keep possession of the land. Of course, if the holder of the certificate of purchase

does not demand possession of the property there is no obligation upon the owner to make any agreement to pay rent or to make an assignment of the rent. In this connection I desire to call attention to the provisions of the next to the last sentence of said section 9954a which provides as follows:

> "Any rent collected by the purchaser, his heirs or assigns, shall operate as a payment upon the amount due the holder of such certificate of purchase, and such amount or amounts, together with the date paid and by whom shall be endorsed as a credit upon said certificate, and which said sums shall be taken into consideration in the redemption of such land, as provided for in this act."

Any rent received during the redemption period must therefore be credited upon the certificate of purchase.

CONCLUSION.

From the foregoing it is the opinion of this office that if the land covered by the certificate of purchase is a homestead the holder of the certificate is not entitled to possession of the land during the redemption period and consequently there is no obligation upon the owner to pay rent during such period, but if the land covered by the certificate is not a homestead the holder is entitled to possession thereof after one year from the date of sale, and after demand for possession the owner may defeat such possession by entering into an agreement to pay or an assignment of the rent estimated to accrue or to be due during such redemption period, in which latter event the amount of rent received must be applied as a credit upon the certificate of purchase.

Respectfully submitted,

HARRY G. WALTNER, Jr.,
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General

HGW:MM

OFFICERS - A person holding a civil office may also at the same time hold a military office within this State, and receive compensation from the State from both offices.

September 25, 1936

9-26

FILED
94

Judge Ray E. Watson
Division No. 1
Circuit Court, Jasper County
Webb City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date wherein you have questioned our ruling under date of August 15, 1933 relating to whether a State officer can receive a salary from a State Department and at the same time receive compensation from the State Fair Board.

The question as presented in our ruling above mentioned is different from the question you have presented in that our previous ruling turns upon persons holding two civil offices, contradistinguished from those holding military offices, and in this opinion we in nowise overrule our opinion under date of August 15, 1933.

Briefly, the question you have propounded is, whether a civil officer can at the same time hold an office in the state militia and be entitled to compensation for his service in the latter office even though such compensation accrues at the time of that of the civil office.

In the course of this opinion we have not deemed it proper to discuss the questions which might arise under certain contingencies, nor have we deemed it necessary in support of the conclusion reached to discuss the incompatability of offices, as it appears from the number of cases read that the courts have invariably contented themselves regarding the inconsistencies or incompatability of offices with the specific facts as presented in those cases.

Under the provisions of Article IX, Section 18 of the Constitution of Missouri, relating to when no person may hold two offices, it reads as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

You will note that the above constitutional provision prohibits a state officer (meaning a civil officer) in cities and counties having more than two hundred thousand inhabitants from holding any office in any county, city or municipality. It prohibits any person from holding two offices at the same time in the same municipality. It further restricts a person from holding an office in one municipality and at the same time holding an office in another municipality. This constitutional provision specifically exempts notaries public, justices of the peace, and officers of the militia.

Under the provisions of Article IV, Section 12 of the Constitution of the State of Missouri it provides:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such office or seat in either house of Congress."

The above constitutional provision also exempts militia officers, justices of the peace and notaries public from being appointed to any other office in this State.

In the case of Gracie vs. St. Louis, 213 Mo., l.c. 394, the court, is discussing who is a public officer, said:

> "If, however, the question be referred to the more general definition of public office, the result would be the same. For instance, McFarlane, J., in State ex rel. v. Bus, 135 Mo., l.c. 332, declares the sum of the matter to be 'that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer.' An office has been defined as 'a special trust or charge created by competent authority' - more tersely still, 'a public office is a public trust.' His oath, his bond, his liability to be called to account as a public offender for misfeasance or non-feasance, the tenure of his position, etc., have been said to be indicia of a public officer. (State ex rel. v. May, supra; Throop v. Langdon, 40 Mich. 682.) And the general doctrine is that the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers as well as that of duty. (6 Words and Phrases, p. 4923.) It has been aptly said that the true test of public office is 'that it is a parcel of the administration of government'. (2 Bouv. L. Dict., Tit. 'Officer.') "

In the case of the United States vs. American Brewing Company, 296 Fed. Rep., l.c. 776, the court in discussing the word "officer", said:

> "The word 'officer' is a term applied indiscriminately to constables and patrolmen, as well as to those who fill offices of the highest dignity and importance. The word 'civil' is commonly used to distinguish those who are in the public service but not of the 'military'."

Under the Constitution of Missouri, Article XIV, Section 6, relating to the oath of officers, whether civil

or military, it provides:

> "All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

The above provision requires that all officers, whether civil or military, shall take and subscribe to an oath before entering upon the duties of their respective offices.

In the case of Ex parte Dailey, 246 S. W. 91, the relator made application to the 66th judicial district court of the State of Texas for a writ of habeas corpus to release him from an order made by said court committing the relator for contempt in refusing to testify as a witness before the grand jury. It was claimed by the relator that the district judge had vacated his office by having accepted a commission as captain in the national guard of the State of Texas and was therefore without any authority to enter an order adjudging relator guilty of contempt.

The facts reveal that the Honorable Horton B. Porter was the duly elected and qualified judge of the 66th judicial district on December 1, 1918, and that on or about the 30th day of December, 1921, while serving as such district judge, he accepted an appointment in the national guard of the State of Texas and was commissioned by the Governor as captain in the national guard. As district judge, he received the sum of $4,000.00 per year, and as captain in the national guard was entitled to receive as compensation for his services the sum of $6.60 for each drill night that not less than sixty per cent of the enlistment of the company of which he was captain, shall assemble for drill. He was also entitled to compensation in the amount of $240.00 per annum as custodian and caretaker of all property that was issued to him as captain of his company by the State of Texas.

The court, in discussing the difference between a civil officer and a military officer, said:

> "No civil office within this state is provided for a term corresponding with that as fixed

for officers of the National Guard as contained in the foregoing article. Article 4, Section 7, of our Constitution, provides: 'He (the governor) shall be commander in chief of the military forces of the state, except when they are called into actual service of the United States. He shall have power to call forth the Militia to execute the laws of the state, ' etc.

"The military forces referred to in the above-quoted article are the National Guard and the reserve Militia. Rev. Stat. title 91, chap. 1. The state has no other military forces, and these are the only military forces in the state that are liable to be called into the service of the United States. The statute further classifies these military forces into the active and reserve Militia. Rev. Stat. 1911, art. 5764, chap. 3, title 91, defines the status and regulates the authority and duties of the members of the Texas National Guard. Throughout the chapter and the entire title, membership in the organization is referred to as 'military service;' the members are classified as 'officers' and 'enlisted men;' the company, regiment, etc., are called 'military organizations.' The organization is required to conform as nearly as possible with that of the Army of the United States, and the discipline conforms generally to that of the Army of the United States. Article 5860, Rev. Stat., declares articles of war by which the 'military forces of this state shall be governed,' and to which all officers and privates are made amenable and under which they are to be tried by court-martial. Articles of War, 35. All through the title relating to the National Guard appears a constant recognition that a 'civil officer' is different and distinct from an 'officer' of the National Guard."

The court held that the district judge did not vacate the office by the acceptance of a commission in the national guard, for the reason that he had not been called into active duty or service of the United States.

Section 13873, R. S. Mo. 1929, provides as follows:

"The military council shall have power to fix the pay and allowance of officers and enlisted men placed on duty under the provisions of this chapter; Provided, however, that such pay and allowances shall not exceed that of officers and enlisted men of the regular army of like grade; and provided further, that this section shall not be construed to authorize any expenditure by the state beyond the sum appropriated for military purposes."

CONCLUSION.

In light of the above, it is the opinion of this department that a person holding a civil office may also at the same time hold a military office within this state, and receive compensation from the state from both offices.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

RCS:FE

CIRCUIT CLERK: Entitled to change of venue fees from other counties in addition to salary, same being non-accountable fees.

3-27

March 26, 1936.

FILED
95

Hon. S.N. West,
Clerk of Circuit Court,
Schuyler County,
Lancaster, Missouri.

Dear Sir:

This department is in receipt of your letter of March 25 wherein you make the following inquiry:

> "I am writing you in regard to change of venue fees. Are they accountable or non-accountable?"

Section 11786, Laws of Missouri, 1933, p. 369, became effective on January 1, 1935, and the last proviso thereof is as follows:

> "Provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

From that date fees of the circuit clerk are to be and have been governed by said Section 11786, the pertinent part of which is as follows:

> "The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In

> counties having a population of less than 7,500 persons, the sum of $1,000.00; * * * Provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; * * * "

Under Section 11814, Laws of Mo. 1933, p. 372, it is the duty of the Clerk of any court of record to collect fees, make certain reports and pay over excess fees. The pertinent part of said section is as follows:

> "It shall be the duty of the clerks of all courts of record to charge and collect, in all cases, every fee accruing to their offices under the provisions of Sections 11785, 11787 and 11788, or of any other statute, except such fees as are chargeable to the county, and if such fees be not paid when due by the party liable for the payment, it shall be the duty of the clerk to forthwith issue a fee bill for same and place such fee bill in the hands of the sheriff of the proper county, who shall forthwith levy same on the persons liable therefor, or their sureties, as authorized and provided by section 11776.

CONCLUSION

It is the opinion of this department that there is no conflict between the statutes merely because Section 11814, supra, states that it shall be the duty of the Clerk to charge and collect all fees under Sections 11785, 11787 and 11788, or any other statute, as Sec. 11814 only compels the clerk to make a report of the fees.

We are of the opinion that you as Circuit Clerk and Ex-officio Recorder of Deeds of Schuyler County are entitled to a salary of $1,000 annually, your county having a population of less than 7500, and in addition thereto you are entitled to retain, as stated in Sec. 11786, supra, all change of venue fees earned from other counties, and as said change of venue fees are in addition to your salary, they, therefore, are not accountable fees.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

COLLECTORS: COUNTY COURTS: Collector is required to advertise land for sale for collection of delinquent taxes, and County Court can not legally justify failure to do so.

September 4, 1936.

9-11

FILED
95

Honorable James Wells,
County Collector,
Buchanan County,
Court House,
St. Joseph, Missouri.

Dear Sir:

We acknowledge your request of August 29th, which is as follows:

> "I was informed today by the presiding judge of the county court that the appropriation for payment of advertising for delinquent lands for sale, would not be made. That means in other words that publishers would be advised by the court that they will not approve the payment of the advertising bill and also means that I will be unable to comply with Section #9952 B Session Acts of 1935, which requires me to advertise for three consecutive weeks, the final advertisement to appear at least 15 days prior to the first Monday in November.
>
> "I cannot blame the court, for last year at a cost of about $2200 for preparation and advertising said lands, we finally sold 31 tracts for a total of $2878.95, which as far as the county revenue is concerned, shows a loss of approximately $2400. This of course is bad business.
>
> "There is no politics in this and there is no ill feeling between the court and myself. It is only a matter of spending about $6 of the county's money in order to get $1 in return.

"Is there any way in the world I can keep from spending this money and if not, what proceedings must I take to force the county court to appropriate this bill."

Section 9952b, Laws of Missouri, 1935, p. 403, among other things, provides:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. * * * * The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

15 Corpus Juris, p. 562, Section 264, states the law thus:

"One who asks payment of a claim against a county must show some statute authorizing it or that it arises from some contract express or implied which finds authority of law. In other words, no claims are chargeable on a county treasury nor can they be paid therefrom except such as the law imposes on the county or empowers it to contract for, either expressly or as a necessary incident, and no officer of the county can charge it with the payment of other claims, however meritorious the consideration, or whatever may be the benefit the county may derive from them, and where a statute prescribes that certain things shall be done at the expense of the county by certain officials of the county, or by persons designated by them,

> only such officials or persons designated can put the county to expense for such items. On the other hand, where certain expenses are declared by statute to be county charges, a county board cannot by resolution or ordinance provide that such expenses shall not be paid unless incurred in a particular manner, or make anything a prerequisite to their performing the duty of auditing such accounts. Services rendered to a county in pursuance of a legal employment, for which no specific compensation is provided, are contingent charges against the county. Also, in the absence of constitutional limitation or restriction, a legislature may require a county board to audit and pay a claim for which no legal liability existed on the part of the county previous to the passage of the statute, * * *."

In the case of Sayler v. Nodaway County, 159 Mo. 520, the Supreme Court of this state had before it the question of determining whether the County was liable for the payment of the postage which was necessarily used by the Probate Judge of Nodaway County in the performance of his official duties. The statute provided that the necessary expense incurred by the Probate Court "for books, stationery, furniture and other necessaries for the office" shall be paid by the County. The County declined to pay this, but the Supreme Court held that it was obliged to pay it, saying that it was among the necessaries of the office within the meaning of the statute, and among other things, saying, l. c. 524:

> "Certainly everything that he is directed to use, or that must necessarily be used in the performance of a designated act or acts required to be performed by him, should be held to be included within the meaning of that term, unless something previously or subsequently used in the section or act so providing, should clearly indicate a contrary intention."

In that case the court held the County to be under the legal obligation of paying for said bill incurred by the official in the performance of his duty, and the statute under which such conclusion was reached did not in terms include the item of postage stamps.

In the instant case the statute in terms requires the County to pay this bill for advertisement which the statute requires the Collector to place in the papers, which, in our view, is a much more decisive command to the County Court to pay this bill than was the command that was considered in the Sayler case.

The Collector of Revenue may not only be impelled by his desire to faithfully perform his official duty to see that lands are properly advertised for sale in order to collect the delinquent taxes, but another reason why he should be zealous in seeing that lands are advertised according to the course set forth in the statute providing for the sale of lands for the collection of delinquent taxes is that if he failed to so advertise such lands, he might be confronted with difficulties in his annual settlement with the State Auditor, if that official were to raise the question that he had not faithfully advertised such lands in conformity with the requirements of the statute, and therefore was guilty of a breach of his bond as Collector in not faithfully and punctually collecting and paying over the state revenues.

CONCLUSION

It is our opinion that it is the duty of the County Collector of Buchanan County to advertise the real estate for sale pursuant to the terms of the statute, Laws of Missouri, 1935, page 403, and that the County Court has no authority by an order of record made by it, nor in any other way, to relieve him of such duty, nor to change or modify the provisions of said law passed by the Legislature, and that the bill for said advertising within the limits prescribed by said statute, when incurred by the Collector in so performing his duty, is a proper and legal charge against the county, and that the County Court is obliged to pay such bill, and that such obligation may be enforced in the courts on their failure to so pay it.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

OFFICIAL BONDS: Members of the State Tax Commission required to give bond in the amount of $10,000 and payment for premium for a surety one cannot be paid out of appropriations to Tax Commission for operation.

January 2, 1936.

FILED 97

Hon. Andy W. Wilcox
Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Wilcox;

This is to acknowledge your letter as follows:

"The State Tax Commission would like an opinion from your Department on the following subject:

'Can this Department pay the premiums on surety bonds out of money appropriated for operation?'

"You are no doubt aware that the three commissioners of this Department are under $10,000. bond each and it has been the custom heretofore to pay it out of the operation appropriation."

Section 9826, R. S. Mo., 1929, provides as follows:

"Before entering upon the discharge of his official duty, each member of the commission shall execute a bond payable to the state of Missouri in the penal sum of ten thousand dollars ($10,000.00), to be

> approved by the governor, for the faithful discharge of official duties, and his official oath, duly subscribed to, shall be indorsed upon their official bond, which bond and oath, when so executed, shall be filed in the office of the secretary of state."

By virtue of the above section it is mandatory upon each Commissioner of the Missouri State Tax Commission, before engaging upon the discharge of official duties, to give a bond in the amount of $10,000.00 to the State of Missouri, and nowhere is it provided therein that the State of Missouri is liable for payment of premium if such is a surety bond.

Laws of Missouri, 1935, pages 35-36, provides for the appropriation to the State Tax Commission and a reading of same shows that salaries of the members of the Commission are found under Paragraph "A" for Personal Service" and under Paragraph "D" is specified the amount to be expended for "Operation" and provides as follows:

> "D. For Operation:
>
> "General expense; including communication, printing and binding, transportation of things, travel, other general expense; material and supplies consisting of small tools, miscellaneous supplies and repairs and stationery and office supplies . . . . . $12,850"

You will note that the appropriation for "Operations" to the Tax Commission does not include the payment of expense items for premiums on bonds if such be surety bonds.

From the above it is our opinion that if the Commissioners of the Missouri State Tax Commission give surety bonds to comply with Section 9826, supra, that the premiums on said bonds cannot be paid out of the appropriation found in Laws of Missouri, 1935, supra.

In support of our conclusion we herewith attach opinions previously rendered by this Department, dated June 18, 1935 and November 5, 1935, to Honorable Forrest Smith, State Auditor, and Honorable Roy H. Cherry, State Inspector of Oils, respectively.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney-General

JLH:EG
Encs.

CITIES THIRD CLASS * Persons who are in arrears for unpaid city taxes at the time the polls closed on election day are ineligible to hold office.

March 6, 1936

2-9

FILED
97

Honorable W. P. Wilkerson
Prosecuting Attorney of
Scott County
Benton, Missouri

Dear Mr. Wilkerson:

This is to acknowledge your letter as follows:

> "I have been requested by the officers of the City of Sikeston to ask an opinion from your office regarding the meaning of Sec. 6743, R. S. 1929, referring to persons elected to city offices who have not paid their taxes. The city officers want to know whether it is the duty of the Mayor and City Council to refuse to declare persons elected to city offices who received a majority vote, but whose city taxes are not paid."

Sikeston is a city having a population of 5676 inhabitants according to the United States decennial census of 1930, and we assume is a city of the third class by virtue of Section 6092 R. S. Mo. 1929.

Article 4, Chapter 38, R. S. Mo. 1929 relates to "Cities of the Third Class" and Section 6723 Provides for the elective officers of said cities of the Third Class. Said section reads as follows:

> "The following officers shall be elected by the qualified voters of the city, and shall hold their offices for two years, and until their successors are duly elected and qualified, to-wit: A mayor, marshal, attorney, police judge, assessor, collector and treasurer. The attorney shall be a person learned in the law."

The officers of a city of the third class must possess certain qualifications and Section 6743 R. S. Mo. 1929 referred to in your letter provides in part as follows:

> "No person shall be elected or appointed to any office who shall at the time he be in arrears for any unpaid city taxes, or forfeiture or defalcation in office."

Your question concerns the interpretation to be given to the part above quoted from Section 6743 supra. As we read said proviso in Section 6743, there is no ambiguity or uncertainty as to what the legislature meant. Perhaps with the defining of the words "Elected" and "City taxes" the answer to your problem is comparatively easy.

In State ex inf. v. Broeker, 11 S. W. (2d) 81, the St. Louis Court of Appeals held that license taxes were not included within the term city taxes as used in Section 6743, having the following to say l. c. 83:

> "Consequently, without further discussion, we conclude that the only reasonable view to be taken of the matter at hand is that the Legislature, in section 8230, R. S. 1919, (Sec. 6743 R.S. 1929) prescribing the qualifications for office, used the term "city taxes" in the same sense as in sections 8267, 8268, R. S. 1919, that is,

> as ordinary property taxes, and did not intend to include license taxes therein, for the imposition and collection of which separate provision was made in the course of the act."

There is no question but that a person would be ineligible to a city office if at the time he was elected, he was in arrears for any unpaid city taxes. State ex inf. v. Page, 140 Mo. 501, State ex rel Thomas v. Williams, 99 Mo. 291.

You will note that the statute uses the words "at the time" and "shall be elected". We are of the conclusion that a person having unpaid city taxes after the polls closed on the date of the election would not be eligible to be declared elected to a city office, and as authority for our conclusion we refer you to State ex inf. v. Berkley, 140 Mo. 184. We quote from said opinion, page 187:

> "Among the admitted facts was this statement: 'It is conceded by both plaintiff and defendant that the point to be decided by the court is, whether the defendant is entitled, under Section 25, of article 4, of the laws of Missouri, 1893, to hold, exercise, and enjoy the office of city attorney of the city of DeSoto, Missouri, said city being a city of the third class, he having failed to pay his delinquent city taxes until 9 o'clock A. M. on the day of the election as aforesaid.'
>
> On this point we have no doubt that defendant paid his delinquent city taxes in time to render him eligible to the office of city attorney, because

> at the time he paid those taxes, to wit, at 9 a.m. of the tenth day of July aforesaid, the election was then in progress, and was not over until the close of the polls on that day."

See also State ex rel. Klsas v. Missouri Workmen's Compensation Commission, 2 S. W. (2d) 796, and State ex rel. Licktenstein v. Missouri Workmen's Compensation Commission, 2 S. W. (2d) 802.

CONCLUSION.

It is our opinion from the above and foregoing that any person who receives a majority of votes cast for an office at an election held for that purpose in a city of the third class would be ineligible to be declared elected if such person was in arrears for any unpaid city taxes at the time the polls closed on said election day. The subsequent payment of said taxes in arrear would not in our opinion qualify said person. It follows that the Mayor and City Council should refuse to declare persons elected to city offices who received a majority vote, but whose city taxes are not paid.

Yours very truly,

JAMES L. HORNBOSTEL
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JLH:SW

ELECTIONS: A person might file a declaration for committeeman or committeewoman and a further declaration for public office.

5/29

May 28, 1936

FILED
97

Hon. Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This is to acknowledge your letter dated May 25, 1936, as follows:

> "Will you please render an opinion on the construction of Section 10244 R. S. Mo., 1929, and more particularly the last provision of the said section that reads as follows:-
>
> 'and no person shall accept a nomination to nor be published as a candidate for more than one office.'
>
> "Specifically, the query is this:- Does this provision mean that a candidate for a public office, either county or state, cannot also be a candidate for committeeman for the township, for his respective political party? or, is the position of committeeman such as that it is not to be construed as an 'office' within the meaning of this section."

The Legislature, by statutory enactment, has provided a plan or scheme for the nominating and election

of persons to office. There is a distinction between the nominating of candidates for office and the election of committeemen or committeewomen to represent the respective political parties.

In State ex rel. Ponath v. Hamilton, et al. 240 S. W. 445, the Supreme Court of Missouri, in Banc, recognized said distinction, having the following to say,page 446:

> "The general purpose of a primary election is to nominate candidates for office. Provision is made in the statute regulating these primaries (section 4848,R.S.1919, (10278,R.S.1929)), however,for the election, at the time they are held, of committeemen to represent the respective political parties."

Article IV,Chapter 61, relates to nominations and section 10232 of said Article and Chapter reads:

> "Any primary election as hereinafter defined, held for the purpose of making nominations to public office, and also electors to the number hereinafter specified, may nominate candidates for public offices to be filled by election within the state. Such nomination shall be made by filing a certificate of nomination, executed with the formalities prescribed for the execution of an instrument affecting real estate."

Section 10233 provides for the certificates of nomination.

Section 10244 relates to "certificate to contain one name," and reads as follows:

> " No certificate of nomination shall contain the name of more than one candidate for each office to be filled.

> No person shall join in nominating more than one nominee for each office to be filled; and no person shall accept a nomination to nor be published as a candidate for more than one office."

A reading of Article IV, supra, shows that the Legislature has provided that nominations rest with the individual if such desires to have his name printed on the ballot to be used at the primary election. The ballot used at the primary election contains the names only of the persons filing certificates of nomination and none other. The Legislature provided by the provisions of Section 10244 that a person could not "be published as a candidate for more than one office." In other words, a candidate could not file or be a candidate for more than one office to be filled at the general election.

Article V, Chapter 61, pertains to Primary Elections, and section 10253 of said Article and Chapter reads, in part, as follows:

> "Hereafter all candidates for elective offices shall be nominated by a primary election held in accordance with this article."

Section 10257 provides, in part, as follows:

> "The name of no candidate shall be printed upon any official ballot, at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, * * * * * *."

Provision is made by virtue of Section 10246, R. S. Mo. 1929, that in the event there is a vacancy on the ticket at the general election that the central committee shall have the power to fill same.

Section 10260, R. S. Mo. 1929, also provides, in part, as follows:

> "No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, * * * ."

In State ex rel. Neu v. Waechter, et al. 58 S. W. (2d) 971, the Supreme Court of Missouri, in Banc, in construing Section 10441, R. S. Mo. 1929, which is similar to Section 10260, said: (page 974)

> "There is absolutely nothing in Section 10441 justifying respondents' contention that a candidate cannot seek a nomination for more than one office on the same party ticket. Neither will section 18, art.9, of the state Constitution, bear that construction.
>
> * * * * * * * * * * * * * * * * * * *
>
> There is, however, a section in the general primary law, section 10244, R.S.Mo. 1929* * * * *which squarely provides 'no person shall accept a nomination to nor be published as a candidate for more than one office.' We shall not attempt to decide whether this statute applies to declarants who file under article 13 of chapter 61, R. S. Mo. 1929* * * * * which includes the sections involved in this case, nor shall we go into the question whether the later filing had the legal effect of vacating

> the earlier, for two reasons: First, because section 10244 is not cited by the parties or invoked by the respondents; and, second, because the relator actually filed with the board a withdrawal of his candidacy for alderman and maintains he is a candidate only for nomination for mayor. If this action on his part was valid and effectual, it disposes of the whole matter."

While the Supreme Court, in the above case, did not interpret the proviso in Section 10244 which concerns us in your inquiry, yet, it is significant that said proviso was called to attention in deciding the question before the court, which, to our mind, indicates strongly that the court would have applied said proviso to the facts before it in that case if the candidate for alderman had not withdrawn. However, in the Waechter case, supra, the candidate filed for two offices that would have been voted upon in the general election, namely, alderman and mayor of the City of St. Louis. In other words, as we read the Waechter case, in the light of the proviso found in Section 10244 no person is entitled to file a certificate of nomination for more than one office at which the candidates are to be chosen at a primary election and the names voted upon at a general election. A committeeman or committeewoman is not nominated at the primary election but is elected at that time, owing to the provision of Section 10278 R. S. 1929 and Section 10278-a Laws of Mo. 1931, pages 208-209. The latter section relates only to the City of St. Louis and is not applicable to the instant question; the former section reads as follows:

> "At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or

> voting district; and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257."

While Section 10278 provides for a filing of a declaration by a person seeking to have his or her name on the primary ballot, yet, by virtue of Section 10258 a filing fee is not required of such person, thus making a distinction as to committeemen and committeewomen and candidates for other offices as to the paying of a filing fee.

In view of the fact that the Legislature has provided no filing fee to be paid by a person seeking to be a committeeman or committeewoman, and also that committeemen and committeewomen are elected at the primary election, we believe the Legislature did not intend the proviso contained in Section 10244 to be applicable to persons filing for committeemen and committeewomen and for other offices. In other words, a person could, in our opinion, file a declaration for committeeman or committewoman and at the same time file a declaration and be a candidate for a public office. However, we do not by this opinion hold that a person elected committeeman or committeewoman could hold that office and another office if such happened to be elected to same. While not germane to the subject, we invite your attention to the fact that said offices might be incompatible owing to the language used by the court in State ex rel. Ponath v. Hamilton, supra, page 447, as follows:

> "The law specifies the terms and prescribes the powers of the

committeemen. This exercise of power characterizes all statutes defining public officers. The nature of the duties committeemen are required to perform adds force to this conclusion. They are required to receive and disburse the filing fees required to be paid by candidates (sections 4828, 4991, R.S.1919); they prepare and submit lists from which judges and clerks of election are to be appointed (sections 4779,4851,5120,5121,R.S.1919); they fill vacancies on the tickets and to that extent exercise the powers of electors (sections 4815,4816,4838,5004, R. S.1919); they nominate candidates for vacancies on the board of aldermen of the city of St.Louis (sections 21 and 22,R.C. St.L.1914); they appoint challengers and watchers at elections (sections 4776, 4840, 4842, 5003,5004, 5007, 5162,R.S. 1919); they elect their own officers, constitute the congressional committee, and elect the state committee (section 4848, R.S.1919). These powers are all matters of public concern. We held,in effect, in State ex rel. Walker v. Bus, 135 Mo. loc. cit. 332, 36 S. W. 636, 33 L.R.A. 616,that one who receives his authority from the law and, in the performance of same, discharges some of the functions of government, may be regarded as a public officer. "

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

JLH:LC

COUNTY BUDGET ACT: County Treasurer is liable on his bond under Sec. 8 of Act if warrants are paid out contrary to terms of Act, but is not liable if warrant is regular and he has no knowledge of fraud in connection therewith; City of third class may use excess funds without an election for the repairing of a sewer.

June 18, 1936.

627

FILED
97

Honorable Mark W. Wilson,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

Dear Sir:

This department is in receipt of your letter wherein you present two questions on which you desire an opinion, the first question being as follows:

> "If a county court should illegally and improperly transfer moneys of the county belonging to one fund to another fund, and then should order issuance of warrants on the fund to which it had been illegally and improperly transfered, would there be any liability on the County Treasurer for issuing checks in payment of warrants so drawn? Or, so far as he is concerned, is he protected from any liability by the order made by the County Court?"

In 1933, the Legislature passed the County Budget Act (Laws of Mo. 1933, p. 340 et seq.) Under Section 2 thereof, it is the duty of the county court at the February Term, in counties of less than 50,000 inhabitants, to classify the proposed expenditures for the fiscal year into five classes, Class 6 being merely to take care of any excess funds which remain after the five other classes have been provided for. The primary duty of the county court and all officers in connection therewith is to sacredly preserve the priority of the classes.

We deem Sections 12167 and 12168, R.S. Mo. 1929 to still be in effect and not in conflict with the Budget Act; however, Section 12167 can only be followed at the close of the fiscal year or as it relates to a special fund which is no longer needed for the purpose for which it was raised.

You state in your letter "if a county court should illegally and improperly transfer moneys * * * belonging to one fund to another" - we assume this to be true, and can only refer you to Section 8 of the County Budget Act (Laws of Mo. 1933, p. 345, which provides in part as follows:

> "* * * Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

In view of the provisions of Section 8, supra, if the County Treasurer should participate in the payment of any warrant contrary to the provisions of the County Budget Act, he would be liable upon his official bond.

As to the treasurer of a municipality in a like situation, it is our opinion that he would not incur the same liability as there are no provisions in the statute in cities of the third class making the treasurer liable. Therefore, if the warrant is regular on its face and issued for a lawful purpose, we do not think the treasurer of a city would become liable on his bond.

Your second question is as follows:

> "A city of 3rd class sold its light plant some 9 or 10 years ago, being authorized to make sale by result of an election held for that purpose. Thereafter, for many years the money was invested in bonds and the interest used for payment of city expenses.
>
> "About a year ago a special election was held submitting the question of sale of a certain amount of such bonds, and a certain definite part of sum realized to be used for construction of sewage disposal plant and sewer work, and a certain definite part to be used in connection with certain W.P.A. projects when approved. Has the City Council authority, without any election being held, to transfer

a part of the funds voted for use on city park, to the fund to be used for sewer work?"

We assume that the election for the sale of the bonds mentioned in your letter was held in conformity with the provisions of Section 6834, R.S. Mo. 1929, which provides:

"The city council is hereby authorized and empowered to provide for the purchase of ground, and the erection of city halls, fire stations, assembly halls, memorial halls, convention halls, public library, hospital buildings, equipment and other buildings and the improvement thereof, and for the payment of the same, and also for all necessary work of improvement specified in this article, by the issue of bonds or otherwise, subject, however, to the conditions and limitations herein specified. No city shall be allowed to become indebted in any manner or for any purpose to any amount exceeding in any one year the income and revenue provided for such year, without the assent of two-thirds of the voters of such city, voting at an election to be held for that purpose, nor in any case requiring such assent shall any indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness: Provided, that any city in incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof within twenty years from the date of contracting and incurring such indebtedness

> and may provide by ordinance the manner of conducting said election under this section, and ascertaining the result of the same."

The situation in your case is rather peculiar in that it appears by the sale of the light plant you received the funds in the first instance. The statutes relating to the issuance of bonds contemplate that a city will not have the funds with which to erect improvements, but gives the city authority to hold elections in order to issue bonds for the purpose of raising funds. We are not able to find a statute governing cities of the third class, under which you probably held the election a year ago wherein the question of selling a portion of the bonds was submitted to the voters.

Under Section 6822, R.S. Mo. 1929, the Council has power to establish a general sewer system, said section being as follows:

> "The council shall have power to cause a general sewer system to be established, which shall be composed of four classes of sewers, to-wit: Public, district, joint district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed or entirely new throughout, as may be deemed expedient. The council may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public sewer tax', and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer."

From the above section you will note the Council has power to levy a tax on all property made taxable to pay for the construction, reconstruction and repairing of such work. It would appear that if the city already has funds available, by transferring a part of the funds which were originally voted for the improvement of the City Park, the same could be used for the sewer work, provided, however, that the funds which were voted for the improvement of the Park have been so used and the portion the city proposes to transfer is excess funds which remain after the proposed park project has been fully carried out.

You do not state in your letter the kind of sewer work or improvement that is proposed; hence, we cannot determine exactly which sections of the statute would be applicable.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

OWN:AH

TAXATION: ASSESSMENT: Personal property assessable in name of administrator where owner died after first of June and before assessment.

July 17, 1936. 720

FILED 97

Hon. Andy Wilcox, Chairman,
State Tax Commission,
Jefferson City, Missouri.

Dear Sir:

This acknowledges your request of July 14, 1936, which is as follows:

> "This Department would like an opinion on the following subject:
>
> "'A taxpayer of St. Louis was living on the first day of June, 1935 and died on the 17th day of June and the assessment was made by the Assessor of the City of St. Louis, against the Administratrix of his estate - Should this assessment have been made against the owner of this property who was living on the first day of June, or against the Administratrix who was appointed on the 22nd day of June?'
>
> "We would like this opinion on or before July 22nd as we have heard this case and are holding it under advisement until the morning of the 23rd."

From a telephone conversation with you, we are informed that your inquiry is directed toward the assessment of personal property, and not with reference to real estate, and the following is said with reference to the assessment of personal property.

Section 9756, R. S. Mo. 1929, among other things, provides that the assessor shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, "or under the care, charge or management of such person."

Section 9757, R. S. Mo. 1929, among other things, provides that the assessor shall leave at the residence or office, etc., a notice requiring the person to make out his list, and further states:

> "If any such person shall have deceased prior to the time when the assessor calls for such list, the assessor shall deliver such written or printed notice to the executor or administrator of such deceased person, and such executor or administrator shall make out and deliver to the assessor such sworn statement of all the property of such decedent."

Section 9763, R. S. Mo. 1929, among other things, provides that the probate judge shall certify to the county assessor a written list of every administrator, executor and guardian, and of every other person legally in charge and control of any estate in the probate court, and after such certification

> "it shall be the duty of the county assessor to take from each administrator, executor, guardian, and every other person legally in charge and control of any estate in such probate court, * * * a list of personal property, * * * ."

In the case of State ex rel. v. Cummings, 151 Mo. 49, l. c. 58, speaking of when jurisdiction is obtained to assess property, the Supreme Court of this state said:

> "By this personal call or written or printed notice, the taxpayer is secured the privilege of stating exactly what property he has and its value. When this call is made on the taxpayer, and request made on him for his list, or, if he be absent, the notice is left for him, within the period from June 1st to January 1st succeeding, then jurisdiction is obtained to assess his property."

In the case of State ex rel. v. Burr, 143 Mo. 209, the facts were that property had been assessed against the curator for the taxes on property which he held as curator and which belonged to his ward, Benton Brant. He contested the tax on

the ground that the state did not have the right to assess and levy taxes upon the property of a minor against his curator in possession thereof. The court holds that such a tax so assessed against the curator is a valid one, saying, l. c. 215:

> "We have the naked proposition of a curator in charge of his ward's estate. An assessment against the curator for the taxes on that estate. No claim that the ward has ever paid it, or that the property was liable to taxation in any other county. We hold it was the evident intention of the legislature to require the curator to list the property and the assessor to assess it against the curator and the curator's duty to pay it and that the action was properly brought against the curator."

In State ex rel. v. Packard, 250 Mo. 686, l. c. 693, the court approvingly quotes from State ex rel. v. Burr, supra, as follows:

> "'The substantial point raised on this appeal is the right of the State to assess and levy the taxes upon the property of a minor against his curator in possession thereof. We cannot find that this question has ever been determined by this court though it is not a new one in other States. It is conceded by the learned counsel for defendant that it is competent for the Legislature by proper enactment to require taxes to be assessed against a curator in charge of a minor's estate and make it a personal charge against him, but he insists that our Legislature has not done so. By section 7531 the assessor or his deputies are required between the first days of June and January "to call at the office, place of doing business, or residence of each person required to list property and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person," and the person listing the property shall enter a true and correct statement of such property in a printed or written blank

prepared for that purpose and sign and swear to it. Elsewhere it is provided that from these lists so made the assessor's book is made up. (Secs. 7553 and 7564.) A curator under our statutes has the possession of the estate of his ward, both real and personal, subject to the superintending control of the probate court. (R. S. 1889, sec. 5297.) It is his duty to represent his ward in all legal proceedings. That "the care and management of the ward's estate" conferred by the statute, is such "care, charge and management" of the estate as is contemplated by the revenue law, we think cannot be disputed and is such as makes it incumbent upon him to list it with the assessor. If listed by and assessed to the curator it is his personal duty to pay the taxes out of the moneys in his hands as curator. The fact that the curator is not the absolute owner of the property is no objection. The statute upon its face clearly indicates that a curator or other trustee shall list not only that which he owns in his own right but that over which he has "the care, charge, or management." There can be no reason why a minor's estate should not bear its equal portion of taxation. Who so appropriate then to list it and see that it is not exorbitantly assessed, and who so proper to pay the tax when assessed, as his curator? When it is conceded that a minor's estate is liable to taxation, it is apparent that either directly or indirectly the curator must furnish the funds to pay it, as he has charge of all the estate of the minor. This question arose in Payson v. Tufts, 13 Mass. 493, in 1816, and it was held that a guardian of minors was liable to be taxed personally for the property of his wards in his possession and the same remedies existed against him on his default for their taxes as upon his own estate. (Baldwin v. Fitchburg, 8 Pick. 494.) No question of domicile or of difference in residence arises upon this record. We have the naked proposition of a curator in charge of his ward's estate. An assessment against the curator for the taxes on that estate. No claim that the ward has ever paid it, or that the property was liable

> to taxation in any other county. We hold it was the evident intention of the Legislature to require the curator to list the property and the assessor to assess it against the curator and the curator's duty to pay it and that the action was properly brought against the curator.'
>
> "We can see no substantial difference between the Burr case and the case at bar. There we had a curator, here an executor. The same statute as to assessment of property in their hands applies to both alike. The reason which applies to the one applies with equal force to the other."

In State ex rel. v. Brown, 172 Mo. 374, the Supreme Court discusses the rights of contending school districts for the taxes against a minor's estate, wherein it would belong to one district if taxable in the name of the minor and where he resided, and would belong to another school district if taxable in the name of the curator. The tax was assessed against the curator. The court, l. c. 383, says:

> "The guardian or curator of a minor may have the personal assets of the minor's estate assessed to him, as indicated in the case of State ex rel. v. Burr, 143 Mo. 209; he having the property of the minor under his management and control. If this is done, we think clearly the taxes on this character of assessment would go to the district in which the guardian resides; for, in that assessment, he treats the property as his own and is personally liable for the taxes and has it assessed to him individually. On the other hand, if the personal estate is assessed to the minor or the estate of the minor, the taxes apportioned to the districts would follow the domicile of the minor. The provision of the statute requiring the taxpayer to list not only his own property but also the property 'under his care, management and control' does not necessarily require a guardian of a minor to make out two lists, one of his individual property and one for the property of his ward; but he may, as is frequently done under the broad provisions

of the statute, list it as his own. In the case of State ex rel. v. Burr, supra, Gantt, J., speaking for the court, says: 'That the "care and management of the ward's estate" conferred by the statute, is such "care, charge and management" of the estate as is contemplated by the revenue law, we think can not be disputed and is such as makes it incumbent upon him to list it to the assessor. If listed by and assessed to the curator it is his personal duty to pay the taxes out of the moneys in his hands as curator.' * * *

"The assessor, as to the personal assets of a minor, may assess it to the minor or to his estate, or he may permit the curator of the ward to list it under the statute heretofore discussed, as his property, it being under his management and control."

The court in the above cases was construing the meaning of the words "or under the care, charge or management of such person" as used in Section 9756, R. S. Mo. 1929. The above decisions hold that the ward's estate is under the control of the curator and may be assessed to the curator, and that the estate of the deceased is under the control of the executor and may be assessed to the executor. The same principle of law applies, we think, to the various classifications, that is to the property under the control of a curator, and to the property under the control of an executor, and to the property under the control of an administrator. On logic and reason, there can be no distinguishing between the three, and the courts having held that the property of the ward is properly assessed in the name of the curator, and that the personal property of the estate of the deceased testate is properly assessed in the name of the executor, it follows as a necessary sequence, and by the same line of reasoning, that the property of the deceased intestate is properly assessed in the name of the administrator.

CONCLUSION

It is our opinion that where a person owned personal property on June 1, 1935, and died on June 17, 1935, and the assessment had not been made on said property at the date of his death, and thereafter an administratrix of his estate was appointed,

that the assessment thereafter made on said personal property is legally made if assessed against and in the name of the administratrix of his estate.

It is our further opinion that it is the duty of the administratrix to hold out of the assets of said estate the proper amount of money to pay, and it is her duty to pay, all taxes which have accrued and become a lien against the property of the estate, whether they be taxes that became payable prior to the death of the intestate or whether they became payable after the administratrix was appointed. The taxes that became a lien against said property on June 1, 1935, are payable in the fall of the year 1936.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

DW:HR

INTOXICATING LIQUOR: City may not prohibit sale of intoxicating liquor within a distance greater than 300 feet of a school or church

July 28, 1936

Opinion No. 97

Mr. Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This will acknowledge receipt of your letter requesting an opinion from this office, which reads, in part:

> "Further, it is my understanding that a county, town, city or village may enact ordinances, etc. but that the same must not limit the application of the liquor statutes. In this connection I am dealing with a city ordinance which prohibits the operation of a retail liquor store within 500 feet of a school or church. The store in question is located 400 feet from a school. Section 44-a-14 permits a municipality to prohibit the operation of such stores within 300 feet of a school or church, but by implication denies the right of the city to increase this zone. In the case at hand the ordinance was amended to make the distance 500 feet rather than 200 feet. I will appreciate your opinion as to the right of the municipality to increase this zone beyond the 300 feet set forth in the statutes."

Section 44-a-14 of the Liquor Control Act, about which you inquire, reads as follows:

> "No license shall be granted for the sale of intoxicating liquor, as defined in this act, within one hundred (100) feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license shall first obtain the consent in writing of the majority of the Board of Directors of such school, or the consent in writing of the majority of the managing board of such church or place of worship. The Board of Aldermen, City Council or other proper authorities, of any incorporated City, town or village, may by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred (300) feet. In such cases, and where such ordinance has been lawfully enacted, no license of any character shall issue in conflict with such ordinance while such ordinance is in effect."

Section 70, 33 Corpus Juris, page 521, reads, in part, as follows:

> "In respect to the enactment of ordinances prohibiting or regulating the traffic in liquors, municipal corporations have been inconsistently held to have only such powers as are expressly conferred upon them by their charters or by statute or such as are necessarily or fairly implied in or incident to the powers expressly granted, * * * *."

15 Ruling Case Law, Section 16, page 262, states the law as follows:

> "The general legislative powers of municipalities are elsewhere discussed and it need be observed in this connection merely that they are confined to those expressly granted by the Legislature and those to be inferred from general grants of power are necessarily incident to those granted."

From the above, it is plain that a municipal corporation's power to regulate the traffic in intoxicating liquor is confined to those expressly granted by the Legislature and those to be inferred from general grants of power which are necessarily incident to those granted. It has uniformly been held by the courts that a city ordinance which is inconsistent with a state statute on the same subject is void.

In the case of St. Louis v. Tielkemeyer 226 Mo. l. c. 140, the court said:

> "It is insisted by appellant that the city ordinance in question is void because inconsistent with the State statute on the same subject.
>
> "The city of St. Louis has express authority under its charter 'to license, tax and regulate . . . saloons, beer houses, tippling houses, dramshops and gift enterprises.' (Art. 3, sec.26, clause 5.)
>
> "The State, however, has the sovereign power to regulate those matters and its authority being paramount, it follows that a city ordinance is not valid if it is in conflict with the law of the State on the same subject. Appellant contends that the ordinance under which he was convicted is in conflict with the statute law of the State in several particulars, which

will be hereinafter discussed."

In the case of State ex rel. v. McCammon 111 Mo. App. 1. c. 630, 631, the Court quoted with approval Black on Intoxicating liquors, section 223, as follows:

> "'The powers conferred upon a municipal corporation must be exercised in conformity to the general laws of the State, unless it is clear that the exclusive control of the subject is given to the municipality or that the general law is to be superseded or suspended by the charter. A statute granting authority to a city to pass ordinances in relation to the liquor traffic does not repeal the general laws on that subject. The rule is that the municipal ordinances cannot set aside, limit or enlarge the statute law of the State, unless its power to do so can be shown in express terms or by necessary implication.' And again at section 224 the same author says:
>
> "' Whenever a change of policy takes place in the State on the subject of its liquor legislation, by the adoption of a different system -- as when general prohibition, or prohibition for particular localities is enacted by a constitutional amendment of general statute, or when the Legislature provides a uniform and general system for the licensing of the traffic -- this has the effect to repeal all inconsistent provisions in municipal charters and the ordinances adopted under them.'"

CONCLUSION

In view of all the above, it is the opinion of this

department that a municipal corporation does not have the authority to prohibit the sale of intoxicating liquor within a distance greater than three hundred feet of a school, church or other building regularly used as a place of religious worship.

It is our further opinion, that a city ordinance, prohibiting the sale of intoxicating liquor within a distance of five hundred feet of a school or church, would be in conflict and inconsistent with Section 44-a-14 of the Liquor Control Act of the State of Missouri and therefore void.

Yours very truly,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General

TA-ATION: Merchant pays ad valorem tax on the highest amount of property owned, possesed or controlled from March until June.

August 18, 1936.

8-19

FILED
97

Honorable Andy W. Wilcox
Chairman State Tax Commission
Capitol Building
Jefferson City, Missouri

Dear Mr. Chairman:

This is to acknowledge your letter wherein you enclosed a communication from Mr. Lester A. Hall, Assessor of Holt County. Mr. Hall's letter had appended to it a Merchant's Assessment List from Mr. E. McQuerry, Mound City, Missouri. Mr. McQuerry appended to his Merchant's Statement a letter which explained his reason for not having a higher assessment statement. Mr. McQuerry's letter in part reads:

> "I enclose herewith my 'Merchant's Statement' regarding the liquor store at Maitland, and you will note that I have given the value at $600.00.
> * * * * *.
>
> "Early last winter there was an attempt to rob the place and we tried to get room in a vault at Maitland to place some of the stock in for safe-keeping but we were unable to get the vault. Failing in this, my creditors who were apprehensive of so much stock and little protection, and myself made arrangements with the State Liquor Inspector to leave a large part of the stock in the warehouse at Rock Port, making it available at any time it was needed.
>
> "I realize that the law says there is to be $1000.00 worth of stock in addition to the liquor."

The question to be decided is whether or not Mr. McQuerry is to pay an ad valorem tax on the greatest amount of goods, wares and merchandise that he had on hand during the taxable period, or should he pay an ad valorem tax on goods, wares and merchandise that he does not own or have on hand because his liquor license requires $1000.00 or more of merchandise in addition to the stock of liquor.

Section 22, Laws of Missouri, 1935, page 274, of the Liquor Control Act, provides as follows, in part:

> "Provided, however, that no license shall be issued for the sale of intoxicating liquor in the original package, not to be consumed upon the premises where sold, except to a person engaged in, and to be used in connection with the operation of one or more of the following business: A drug store, a cigar and tobacco store, a grocery store, a general merchandise store, a confectionery and/or delicatessen store, nor to any such person who does not have and keep in his store a stock of goods having a value according to invoices of at least one thousand ($1000.00) dollars, exclusive of fixtures and intoxicating liquors."

The Liquor Control Act is very specific and requires a person having a license to sell intoxicating liquor in the original package, not to be consumed upon the premises where sold, to have a stock of goods of the value of $1000.00, exclusive of fixtures and intoxicating liquors. Mr. McQuerry could not obtain a license to dispense liquor unless he complied with Section 22. He evidently attempts to comply with the above proviso because he states that he "made arrangements with the State Liquor Inspector to leave a large part of the stock in the warehouse at Rockport, making it available at any time it was needed."

Section 10077, R. S. Mo. 1929, provides as follows:

> "Merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time

between the first Monday in March and the first Monday in June in each year: Provided, that no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other state, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

You will note that the above section requires merchants to pay an ad valorem tax "on the highest amount of all goods, wares and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale." If Mr. McQuerry has liquor stored at Rockport, but is owned by him or in his possession or under his control, then of course the stock at Rockport should be returned for assessment purposes. However, Section 10077, supra, only provides for the paying of an ad valorem tax by merchants on the amount of goods such own or in their control, and if Mr. McQuerry does own or have under his control only $600.00 worth of goods, that would be all the tax he would have to pay, regardless of what he was supposed to have on hand by virtue of Section 22.

In other words, if Mr. McQuerry violates the provisions of Section 22, supra, by not having the required stock of goods, in addition to fixtures and liquor, it would give the assessor no right to exact an ad valorem tax on the amount that he should have on hand in order to comply with Section 22. However, when a Merchant's Statement is returned to the assessor and said merchant is engaged in the retail liquor business, we believe the assessor should investigate and find out why the stock of goods is not being kept as provided by Section 22. The assessor has the right to conduct his own investigation as to property liable for taxation and not returned. However, if after his investigation, he finds that $600.00 represents the highest amount of all goods, wares and merchandise owned or in the possession of or under the control of the merchant returning the statement, that is the figure that is to be returned for taxation purposes.

We are returning Mr. Hall's letter, together with the Merchant's Assessment list and letter of Mr. E. McQuerry.

Yours very truly,

APPROVED:

James L. HornBostel
Assistant Attorney-General

JOHN W. HOFFMAN, Jr..

ASSESSORS: Not entitled to charge for list of each stockholder in a bank, but can charge for only one bank list.

September 21, 1936. a-23

FILED 97

Hon. Mark W. Wilson,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

Dear Sir:

We acknowledge your recent inquiry, which is as follows:

> "I will appreciate your opinion on the following propositions:
>
> "'The Township assessor assessed 360 stockholders of a bank on their respective shares of stock. The County Clerk of the County at that time told him he was entitled to charge 10 cents for each entry of the stockholders names in the assessment book, which amount was charged by the assessor, but the State Auditor informs said assessor that this amount will have to be refunded. Do you think this is the law?'
>
> "'Also the State Tax Commission informs the assessor that he is entitled to make a separate tax list for each non-resident stockholder for which he may charge 35 cents each. Is this correct?'
>
> "I will appreciate your prompt reply on these propositions."

Replying thereto, Laws of Missouri, 1931, page 357, Section 9765, prescribes the course the assessor shall take in assessing bank stock, and among other things provides as follows:

> "Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, * * *. It is hereby made the duty of the county clerk to include in his abstract of the assessor's books required to be sent to the state auditor, valuation of all property assessed under this section under the head of 'corporate companies,' and, in addition thereto, he shall make out from the lists delivered to the assessor as above provided, and send the same to the state auditor to be laid before the state board of equalization, * * * an abstract of the assessment of all corporations * * * doing a banking business in his county, showing the name of each bank, the number of shares of stock and their face value, the amount of reserve funds, undivided profits, premiums or earnings, and all other values, together with the assessed value thereof, * * *."

It will be noted that said section specifically provides that the person owning shares of stock in the bank is not required to deliver a list thereof to the assessor, but, on the contrary, the chief officer of such bank shall deliver to the assessor "a list" of all shares of the bank stock.

It is true that further on the section provides that the county clerk shall include in his abstract of the assessor's books to the Auditor the bank stock, and it states "he shall make out from the lists delivered to the assessor as above provided," etc., but that latter is a pronouncement with respect to the duties of the county clerk, and not with reference to the duties of the assessor. On the contrary, the statute in speaking of the duties of the assessor with respect thereto uses the singular, to-wit, "a list thereof", which indicates that the Legislature had in mind a single list, though it comprise all of the bank stock of the bank, in speaking of the duties of the assessor with reference to the assessment thereof. What the Legislature said later in the section with reference to the duties of the county clerk does not enlarge the meaning of what they said earlier with reference to the duties of the assessor to the extent that he

would be entitled to consider each shareholder a separate list, in view of the fact that statutes authorizing the payment of fees to officials are given strict construction, and in view of the further fact that there is some probability that the assessor would not be entitled to double compensation or to compensation for taking two lists from the same person if that person happened to own other property assessable in the county in addition to bank stock.

In the case of State ex rel. Troll v. Brown, 146 Mo. 401, l. c. 406, the Supreme Court of this state says:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed vs. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

To like effect is the case of State ex rel. v. Gordon, 245 Mo. 12, l. c. 27, and also the case of King v. Riverland Levee District, 279 S. W. 195, l. c. 196.

Giving said statute such strict construction, it does not appear to comprehend the action of the assessor in so charging.

CONCLUSION

It is our opinion that the assessor of a given county who takes the sworn list of bank stock from the chief officer of a bank, said list containing more names than one of the shareholders in said bank, is entitled to charge for one list,

that being the list furnished to him by the chief officer of said bank. It is our further opinion that such assessor is not authorized by the statutes as now written to charge for additional lists or to consider as a list each of the separate shareholders in said bank.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN,
(Acting) Attorney General.

DW:HR

TOWNSHIP ORGANIZATION:)
TAXATION:)
POLL TAXES:)

Re levying of poll taxes in counties under township organization.

December 16, 1936.

12-77

FILED
97

Honorable Mark W. Wilson
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this Department. Your letter is as follows:

> "Representatives of the citizens of one of our townships have come to me and ask if they will have to pay poll tax this year under the following circumstances:
>
> "The township board did not appoint a road-overseer as provided by law and no notices were given to work out the poll tax.
>
> "The poll tax is paid at the time of the other taxes and these people want to know if they can pay the other tax without paying the poll tax, since there was no overseer and no warning notices given.
>
> "Now the township board comes to me and wants to know who shall sign the receipts for the poll tax paid if they have to pay it or if they voluntarily do so.
>
> "These questions are very material to this community at the present time, so I will appreciate an opinion as soon as possible."

The facts as set forth in your letter of inquiry, relative to the assessment of poll tax, are somewhat meager, but from your statement we assume that the township board (Henry County being under township organization) did not appoint a road overseer in the month of April as provided by Section 8150, R. S. Mo. 1929. Neither did a road overseer in the township in question qualify and give bond under the provisions of Sections 8151 and 8152, R. S. Mo. 1929. In other words, there has been a non-compliance in said township relative to the appointment of road overseers.

Under township organization Section 8158, R. S. Mo. 1929, provides that,

> "The township board shall, at the regular April meeting, levy, for road purposes, a poll tax in the township in the same manner and under the same restrictions as provided for such levy by county courts in counties not under township organization. * * * *"

Under counties not under township organization the manner of levying and collection of a poll tax are found in Sections 7880, 7881, 7882, 7883, 7884, 7885, 7886, 7887 and 7888, R. S. Mo. 1929, and the above sections must be looked to for the procedure in the levying and collection of poll taxes in the counties under township organization as required by Section 8158, R. S. Mo. 1929, in so far as the same is applicable and not differently provided for in the township organization law relative to same. In the absence of the appointment of a road overseer by the township board, evidently there has been an absolute non-compliance with the statutes relative to the duties of the road overseer with respect to giving warning notices to those eligible to pay poll tax, and no warning notices whatever have been given as provided by Section 8159, R. S. Mo. 1929.

We are not unmindful of what is said in Section 7880, R. S. Mo. 1929, that "no poll tax payer shall be exempt from the payment of this poll tax on account of any

mistake or defect in the warning notice to work the roads."

It will be noted that in counties under county organization the county courts levy the tax and the county clerks make up the lists, while under township organization these duties devolve upon the township board and the township clerk, respectively.

From the facts as stated in your letter, and on those facts alone, we must conclude that there has been such a material non-compliance with the assessment in the collection of poll taxes which would invalidate the levy of poll taxes in that township. Of course, upon a suit brought for the collection of the poll taxes, it may be shown that there has been a sufficient compliance with the statutes to make a valid levy, but upon your statement it would seem that such is not the case. We see no reason why the taxpayers of that township may not pay their general property tax without reference to the payment of their poll taxes.

We hope that this sufficiently answers the questions requested in your letter.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

SHERIFFS: Sheriff can succeed himself in office when?

2-19

February 17, 1936

FILED
99

Honorable Pleas Wright
Sheriff of Boone County
Columbia, Missouri

Dear Sir:

We acknowledge your request for an opinion dated January 28, 1936, which reads as follows:

> "As the present sheriff of Boone County, Missouri, I desire the opinion of your office upon the following proposition:
>
> "At the November election 1932 Roger Wilson was elected Sheriff of Boone County and on January 1, 1933, qualified and served as such sheriff until June 14, 1933, at which time he was killed while in the performance of the duties of his office. Immediately thereafter I was appointed by the County Court as acting sheriff for thirty (30) days, at which time a special election was held to fill the vacancy in the sheriff's office of Boone County and at that special election I was elected to fill the unexpired term of the said Roger Wilson and my commission so reads.
>
> "I now desire to become a candidate for Sheriff of Boone County at the regular 1936 election and I am desirious of having your opinion as to whether I am eligible to be elected sheriff for a full term under the circumstances. Section 11, Article IX of the Constitution of Missouri relates to this matter, but I desire the benefit of your opinion relative to the matter."

Article IX, Section 10, Missouri Constitution provides in part as follows:

> "There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. * * * * *."

Article IX, Section 11 of the Missouri Constitution provides:

> "Whenever a vacancy shall happen in the office of sheriff or coroner, the same shall be filled by the county court. If such vacancy happen in the office of sheriff more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold office until the person chosen at such election shall be duly qualified; otherwise, the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified. If any vacancy happens in the office of coroner, the same shall be filled for the remainder of the term by such county court. No person elected or appointed to fill a vacancy in either of said offices shall thereby be rendered ineligible for the next succeeding term."

Article XIV, Section 5, Missouri Constitution provides:

> "In the absence of any contrary provision, all officers now or hereafter

elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

CONCLUSION.

By the constitutional provisions above quoted we see that the office of sheriff in Missouri may be filled either by election at the General Election, held every four years, as per Section 10, surpra, or said office may be filled, in case of vacancy, by appointment of the County Court, or where the vacancy in office occurs more than nine months prior to the time of holding a General Election, then a special election of a sheriff to fill the vacancy is provided for and the sheriff appointed to fill in the vacancy holds the office until the person elected at the special election be duly qualified, as per Article IX, Section 11, supra.

We are enclosing the opinion of this Department written by Honorable Olliver W. Nolen, Assistant Attorney General, to Honorable Joseph C. Crain, dated June 15, 1934. Following the logic of said opinion we believe the office of sheriff in Boone County could have been filled at the General Election of November, 1934, and your commission which reads that you, at the special election, were elected to the unexpired time of Roger Wilson, does not mean that you were elected to hold office until the General Election 1936. The office of Boone County not being filled at the General Election of 1934, presents this situation: We believe that you are now holding said office pursuant to appointment and special election as provided in Article IX, Section 11, supra, and are now enjoying the office as a hold-over. Having qualified for said office after the special election, and by failing to run for reelection in 1934, you are now holding said office under the provision of Article XIV, Section 5, supra, and have a right to said office until a successor be "elected, appointed and qualified."

It is true that a sheriff elected under the provisions of Article IX, Section 10, supra, can serve but four years and until his successor be elected and qualified, but the prohibitions of Article IX, Section 10, supra are

not applicable in your case because you have never held the office by virtue of said section. Your present title to the office is by virtue of Article IX, Section 11, supra and Article XIV, Section 5, supra, and since one who is appointed or elected to the office of sheriff by virtue of Article IX, section 10, supra, can not thereby "be rendered ineligible for the next succeeding term", and since the election of November, 1936 starts the next succeeding term of office to the term to which you were elected to fill the vacancy, it follows as our opinion that nothing in the law prohibits you from being a candidate to succeed yourself, and if elected we are of the opinion that you could hold office for four years and until your successor be duly elected and qualified, unless sooner removed for malfeasance in office.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

WOS:H

COUNTY SUPERINTENDENT OF SCHOOLS: It is the duty of the county superintendent of schools to investigate school loans; said investigation being for the purpose of ascertaining if the county court complies with the statutes in loaning school moneys.

2-19

February 18, 1936.

FILED
99

Honorable John J. Wolfe
Associate Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Wolfe:

This is to acknowledge your letter, which in part reads as follows:

> "I would appreciate for the guidance of the Grand Jury an opinion from you relative to Section 9458, regarding the County Superintendent of Schools, * * * *.
>
> * * * * * * *
>
> "We would like to know if under this statute the county superintendent of schools is required to examine the school loans, that is, the notes and mortgages given to the county court for the school money loaned."

Section 9456, R. S. Mo. 1929, provides that the county superintendent of schools, before entering upon the duties of his office, must take and subscribe to an oath to discharge the duties of his office faithfully and impartially.

Section 9458, R. S. Mo. 1929, referred to in your letter, places a duty upon the county superintendent as follows:

> "* * * He shall examine the records of the county, so far as they relate

> to school funds and school moneys, see that the law is strictly observed, and shall be present at the August Term of the county court, to give such information as may be of importance to said court in the transaction of all business pertaining to the school interests of the county. * * * *."

The county court has imposed upon it the duty of collecting, preserving and investing school funds and school moneys. Sections 9243 to 9255, inclusive, R. S. Mo. 1929.

The above statutes require the county court to do certain mandatory things relating to school loans, namely: charge a minimum amount of interest; and obtain security of a certain nature and character. The county court may also exact personal security and demand additional security. Provision is also made as to the procedure necessary for collection or foreclosure.

The county superintendent has nothing to do with the loaning of school moneys. However, by virtue of Section 9458, supra, it is his duty to ascertain by investigation or examination if the county court is loaning school funds or school moneys according to the statutes. It would not be, in our opinion, the superintendent's duty to pass upon the solvency of the security. However, it would be his duty to ascertain if security was given, that is, as to whether or not the county court required security for the loans. We believe the intention of the Legislature was to have someone responsible for inquiring into the manner and method the county court was making loans and to have a check on the county court, in the event such loaned school moneys other than as provided by statute. If the county court was loaning money at an interest less than four per cent the county superintendent should call said fact to the attention of the court, and if the county court was loaning money on security other than that provided by statute, then said fact would be revealed by an examination of the records by the superintendent. However, the county superintendent would not be

required to examine into the solvency or insolvency of notes and mortgages. But, if he has information to the effect that notes are insolvent, he should advise the county court of his investigation, so that additional security could be exacted.

From the above it is our opinion that it is the duty of the county superintendent of schools to examine the records of the county court, concerning school loans, for the purpose of ascertaining if the county court is complying with the statutes relating thereto.

It is our further opinion that it is the duty of the superintendent to ascertain whether or not notes and mortgages were given, but the solvency or insolvency, adequacy or inadequacy, of said notes and mortgages would not be a matter for his determination. However, if he has information that certain notes are insolvent or inadequate he should, at least, when present at the August Term of the County Court, give them that information. However, as stated, it is not his duty to personally investigate every note or mortgage for solvency or otherwise, in our opinion.

Yours very truly,

James L. HornBostel
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

JLH:EG

COUNTY BUDGET ACT: Contracts arising in counties of more than 50,000 to be paid out of special road and bridge levy fund are required to be advertised or notices published under Sec. 19, Laws of Mo. 1933, p. 350 if amount is more than $500.00.

2-20

February 20, 1936.

FILED
99

Honorable J. J. Wolfe,
Associate Prosecuting Attorney,
St. Louis County,
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of February 8 wherein you make the following inquiry:

> "Kindly advise whether or not in your opinion purchases for which payments are made out of the special road and bridge levy are required to be advertised or posted under the provisions of Section 19 of the County Budget Law of 1933.
>
> "Materials, tools and equipment used in and on roads and bridges are many and varied and if purchased at opportune times when the prices are low or when certain dealers have a surplus, a great saving can be affected. If, however, we are required to advertise or post notices inviting bids, the time lost thereby and the opportunity of bidders to consult with each other may prevent our availing ourselves of these savings."

St. Louis County, having a greater population than 50,000, is governed by Sections 9 to 20 inclusive of the County Budget Act.

On January 21, 1936 this department rendered an opinion to Honorable O.A. Kamp, Prosecuting Attorney of Montgomery County, in which it was held that a special road and bridge fund did not become a component part of the six classifications as contained

in Section 2 of the County Budget Act, which relates to counties having less than 50,000 inhabitants. In counties of more than 50,000, the terms of the County Budget Act and the general financial set-up are not as definite as in counties containing less than 50,000 inhabitants. A copy of the opinion above referred to is hereto attached.

Section 19 of the Act (Laws of Mo. 1933, p. 350) is as follows:

> "All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment, or services other than personal made by the officer in charge of purchasing in any county having such officer.
>
> "No contract or order imposing any financial obligation on the county shall be binding on the county unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred and unless such contract or order bear the certification of the accounting officer so stating; providing that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it shall be sufficient for the accounting officer to certify that such bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of such bonds yet to be sold or of such taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least 500 copies per issue, if

there be such, except that such advertising shall hot be required in case of contracts or purchases involving an expenditure of less than $500.00, in which case notice shall be posted on the bulletin board in the court house. All bids for any contract or purchase may be rejected and new bids advertised for.

"Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies, materials, equipment, or services other than personal therein described, in such quantities as may be required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer as herein provided; but all orders for such supplies, materials, equipment, or services other than personal shall bear such certification. In case of such contract, no financial obligation shall accrue against the county until such supplies, materials, equipment or services other than personal are so ordered and such certificate furnished."

Section 7891, R.S. Mo. 1929 refers to the levying of a special road and bridge tax, and is as follows:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county; provided, however, that all that part or portion

> of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road; provided, further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

We call your attention to the clause in Section 7891, supra, which says, "but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county".

Section 10 of the County Budget Act (Laws of Mo. 1933, p. 346) throws some light on the question at hand in the provision:

> "The annual budget of any such county shall present a complete financial plan for the ensuing budget year. It shall set forth

> all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits or surpluses from prior years; all interest and debt redemption changes during the year and expenditures for capital projects. In addition, the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures. * * *"

Section 12 of the Budget Act (Laws of Mo. 1933, p. 348) provides for the contents of the budget for the county, as follows:

> "The budget document shall include the following: (1) a budget message outlining the fiscal policy of the government for the budget year and describing the important features of the budget plan, giving a general budget summary setting forth the aggregate figures of the budget in such manner as to show the balanced relations between total proposed expenditures and total expected income and other means of financing the budget compared with the corresponding figures for the last completed fiscal year and the current fiscal year, and including explanatory schedules classifying expenditures by organization units, objects, and funds, and income by organization units, sources, and funds; (2) the detailed budget estimates, as provided for in the preceding section of this act, showing the recommendations of the budget officer compared with the figures for the last completed fiscal year and the estimates for the current fiscal year; (3) complete drafts of appropriation and revenue orders to put the budget into effect when approved by the county court.* * * *"

Section 18 of the Act (Laws of Mo. 1933, page 350) provides:

> "Except as in this section otherwise specified, all offices, departments, courts, institutions, commissions,

> or other agency spending moneys of the county, shall perform the duties and observe the restrictions set forth in the preceding sections relating to budget procedure and appropriations. The estimates of the circuit court, including all activities thereof and of the circuit clerk, shall be transmitted to the budget officer by the circuit clerk. The estimates of the circuit clerk shall bear the approval of the circuit court. The budget officer of the county court shall not change the estimates of the circuit court or of the circuit clerk without the consent of the circuit court or the circuit clerk, respectively, but shall appropriate in the appropriation order the amounts estimated as originally submitted or as changed, with such consent."

Referring again to Sec. 10 of the Act (p. 346), we call your attention to this provision:

> " * * * All receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for such purposes shall be charged to such fund; provided, that receipts from the special tax levy for roads and bridges shall be kept in a special fund and expenditures for roads and bridges may be charged to such fund. * * *"

CONCLUSION

You will note from the enclosed copy of opinion to the Honorable O.A. Kamp that we held the special road and bridge fund was not to be taken into account in formulating the annual budget for counties of less than 50,000 inhabitants for the reason that the various sections were silent as to special tax levy and in view of the fact that Sec. 7891, supra, states specifically that the funds derived from such tax shall be placed to the credit of the "special road and bridge fund" and in addition thereto, none of the six classes were sufficiently broad in their terms to include the special road and bridge fund.

In the instant case the Legislature has seen fit to specifically mention the special road and bridge fund and has made it a part of the annual budget and directed how the fund shall be kept in counties of more than 50,000 population. We are therefore

of the opinion that the purchase of materials, tools and equipment as mentioned in your letter, is amenable to the terms of Section 19 of the County Budget Act, and if the amount involved in the contract is more than Five Hundred Dollars, it is necessary to advertise or post notices inviting bids.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

CORONERS: Not eligible to said office for over four years continuously in any period of time.

May 19, 1936.

5-20

FILED 19

Honorable J. R. Womack, M. D.
Coroner of Texas County
Houston, Missouri

Dear Sir:

We acknowledge your request for an opinion, dated April 13, 1936, which reads as follows:

> "In recent instructions to Coroners sent out from your office you stated that a Coroner could not succeed himself if he had served four years.
>
> "I have served Texas County, as Coroner, for most of four years. What I would like to know if if I should resign now and be appointed to serve out the unexpired term, would I then be eligible for reelection? In conference with you yesterday I understood you to say that I could do this.
>
> "If the above arrangement would not be satisfactory could I resign before the four years were up and then be eligible for reelection?"

Article IX, Section 16, of the Missouri Constitution provides:

> "There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D. 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office, they shall give security

> in the amount and in such manner as shall be prescribed by law, and shall be eligible only four years in any one period. Whenever a county shall be hereafter established, the Governor shall appoint a sheriff and coroner therein, who shall continue in office until the next succeeding general election and until their successors shall be duly elected and qualified."

Article IX, Section 11, Missouri Constitution provides:

> "Whenever a vacancy shall happen in the office of sheriff or coroner, the same shall be filled by the county court. If such vacancy happen in the office of sheriff more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold office until the person chosen at such election shall be duly qualified; otherwise, the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified. If any vacancy happen in the office of coroner, the same shall be filled for the remainder of the term by such county court. No person elected or appointed to fill a vacancy in either of said offices shall thereby be rendered ineligible for the next succeeding term."

Article XIV, Section 5, Missouri Constitution provides:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Pursuant to the above constitutional provisions the Legislature has provided in Section 10167, R. S. Mo. the following:

> "On the first Tuesday after the first Monday in November, in the year 1880, and every two years thereafter, there shall be an election held in each township in this state, and in each ward of the city of St. Louis, for the election of a member of congress from each congressional district, of senators and representatives in those districts and judges of the county courts in those counties where the term of those elected has expired, and for sheriffs and coroners, and such other officers as may be required by law to be elected at such elections."

The Legislature has provided in Section 11196 R. S. Mo. 1929, the following:

> "All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

The people have a right to such period and in such a manner as they shall establish by their constitution, to cause or allow their public officer to return to private life, and to fill up vacant places by certain and regular elections and appointments. To this end are the provisions of the Missouri Constitution above quoted. Similar provisions may be found in the consitutions of other states from earliest times, regulating and controlling rotation and succession in office.

Luce, on Legislative Assemblies, p. 346, reads as follows:

> "Pennsylvania was the first colony to have the rotation idea put into its frame of government. William Penn's Charter of Liberties provided that (after seven years) when a member of the Provincial Council (the upper branch) ended his three years' term, he should be 'uncapable of being Chosen again for one whole year following that so all may be fittest for the Government and have Experience of the Care and burthen of it.' The provision disappeared in 1696, but it was not forgotten. When the Convention

of 1776, over which Benjamin Franklin presided, and which he no doubt inspired, created but one legislative body, it said: 'No person shall be cabable of being elected a member to serve in the House of Representatives of the freemen of this Commonwealth more than four years in seven.' It was also provided that a delegate of the State in Congress should serve no longer than two years successively and be incapable of reelection for three years afterward; that any person having served as a member of the Supreme Executive Council of the State for three successive years, should be incapable of holding that office for four years afterward; and that one third of the Council should be replaced each year. 'By this mode of election and continued rotation,' it was explained, 'more men will be trained to public business, there will in every subsequent year be found in the Council a number of persons acquainted with the proceedings of the foregoing years, whereby the business will be more consistently conducted, and moreover the danger of establishing an inconvenient aristocracy will be effectually prevented.'

"Franklin persisted to the end of his admiration of the idea. Madison reports him as saying in the Federal Convention: 'It seems to have been imagined by some, that the r eturning to the mass of the people was degrading the magistrate. This, he thought, was contrary to republican principles. In free governments, the rulers are the servants, and the people their superiors and sovereigns. For the former, therefore, to return among the latter, was not to degrade, but to promote, them. And it would be imposing an unreasonable burden on them, to keep them always in a

state of servitude, and not allow them, to become again one of the masters.' "

And further on pages 347 to 349 reads as follows:

"Another of the great men of the time who believed in rotation was Thomas Jefferson. His State had put into the Bill of Rights of the Constitution of 1776; 'The legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.' It was in the spirit of this that Jefferson prepared, probably not long after the framing of the Virginia Constitution, a resolution for the rotation of members of the Continental Congress. It was rejected, but is worth quoting for the light it sheds on one phase of the opinion of that day:

" 'To prevent every danger which might arise to American freedom by continuing too long in office the members of the Continental Congress, to preserve to that body the confidence of their friends, and to disarm the malignant imputation of their enemies: It is earnestly recommended to the several Provinces, Assemblies or conventions of the United colonies that in their future elections of delegates to the Continental Congress one half at least of the persons chosen be such as were

not of the delegation next preceeding, and the residue be of such as shall not have served in that office longer than two years.'

"When the Federal Constitution had been drawn, Jefferson wrote to Madison, December 20, 1787, that a feature of it be disliked, and strongly disliked, was the abandonment of the principle of rotation in office, 'and most particularly in the case of the President,' He was not the only man to reach that office who may have changed his views about the desirability of second terms.

"Maryland followed Virginia in making an abstract statement of the principle, but confined it to the executive branch, saying: 'That a long continuance, in the first executive departments of honor or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.' No other State referred to it until John Adams came to write the Constitution of Massachusetts. In 1776 he had given the idea half-hearted approval. 'A rotation of all offices,' he had said, 'as well of representatives as of counsellors, has many advocates, and is contended for with many plausible arguments. It would be attended, no doubt, with many advantages; and if the society has a sufficient number of suitable characters to supply the great number of vacancies which would be made by such rotation, I can see no objections to it. These persons may be allowed to serve for three years, and then be excluded three years, or for any longer or shorter term.' Four years later he put into the Bill of Rights of his State: 'In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause

> their public officers to return to private life; and to f ill up vacant places by certain and regular elections and appointments.' "

The arguments for and against rotation and non-succession in office are not new. It is for us to construe and harmonize the provisions of the Missouri Constitution according to the intention of the framers and in the light of historical background. What did the people mean when they provided that the coroner "shall be eligible only four years in any one period"? Construing this quoted phrase we must read and understand the context of both sections 10 and 11 of Article IX, supra. We see that these sections refer to one possible elective term and to two possible appointive terms of this constitutional office. Any one of the three exigencies provide separate constitutional terms of this office.

12 Corpus Juris, p. 707, Section 55, reads as follows:

> "The presumption and legal intendment is that each and every clause in a written constitution has been inserted for some useful purpose, and therefore the instrument must be construed as a whole in order to ascertain both its intent and general purpose and also the meaning of each part. It follows, therefore, that, as far as possible, each provision must be construed so as to harmonize with all others, yet with a view to giving the largest measure of force and effect to each and every provision that shall be consistent with a construction of the instrument as a whole. Different sections, amendments, or provisions relating to the same subject, must be construed together and read in the light of each other."

Noah Webster defines the noun "period" thus: "length of existence; duration."

In the case of People v. Leask, 67 N. Y. 521, l. c. 527, that Court said:

> "The word <u>period</u>, in its proper meaning, has reference to a lapse of time; and the statute in the use of it, had reference to a lapse of time, as measured by the measures of time in use among men. * * * A period of time is a stated and recurring interval of time, a round or series of years, by which time is measured. When the statute prescribed the term of office of the clerks to be, in general phrase, for the same period, it referred to the stated and recurring interval of time, to the round of series of years which it had already named, to wit, six years."

We believe that by taking the dictionary definition of the noun "period" as used in the Constitution, then the phrase should well read that the coroner "shall be eligible only four years in any length of existence." The three official constitutional terms provided for the coroner in the Constitution might continue for an indefinite period but for this limitation of eligibility, and this exigency was in the minds of the framers. Our construction eliminates a coroner from continuing in office indefinitely while occupying an official term. Armed with such power, it was not intended that he use his office to perpetuate himself in office but for a four year cycle of continuous time. Continuation in office beyond a four year cycle was thought not best for the welfare of the people, hence the constitutional limitation. On the other hand arbitrary retirement of a trained and efficient officer was thought not best for the welfare of the people. Hence the constitutional limitation, measured by a four year cycle of time was not intended to effect those persons whose term, or continuous successive terms did not run through a four year cycle of time. This constitutional provision is self-enforcing, and the happening of the constitutional limitation of eligibility automatically vacates the office, and for filling this vacancy in office, the people by their Constitution took forethought and provided the method and term.

Under Article IX, Section 11, supra, the County Court in all cases of vacancy in the office of coroner, must fill the vacancy and the appointed officer is to hold the office until the person elected in the next general election be

duly sworn and qualified. This section specifically provides that the person appointed by the County Court to fill a vacancy in the office of coroner is eligible for the next succeeding term, and by its very specifications we believe it to be an exceptional instance when the four years continuous cycle cannot operate as a limitation on eligibility to the office of coroner.

Under the provisions of Article XIV, Section 5, supra, we see that all constitutional officers hold their office "subject to the right of resignation", which provisions in the fundamental law abates the common law rule imposing public office on people.

CONCLUSION.

Applying our construction of the above quoted statutes and constitutional provisions to your particular problem, we see that your office of coroner of Texas County, Missouri, was filled pursuant to the general election of 1932, and that under the statutory and constitutional order of election the office of coroner will again be filled, pursuant to the general election to be held November 3, 1936.

Under the provisions of Article XIV, Section 5, supra, of the Missouri Constitution, you, as constitutional officer, are privileged to resign your office at will.

We are of the opinion that should you resign and the County Court of Record accept your resignation, we will believe that up until that time the office continues in you until that period of time that your successor is appointed to commence the unexpired term provided for in the Constitution, and he be commissioned and qualified as provided in Section 11196, supra.

We are of the opinion that nothing in the Constitution, Statutes, or common law prohibits you from succeeding yourself in the unexpired term, should the Court see fit to appoint you for this unexpired term. We are of the opinion that should you, as coroner, resign at this time of your term, and a successor be appointed for the unexpired term, other than yourself, in such a case you could run for the office again in the general election of November 3, 1936, and should you be elected you would be eligible to take over the office in the face of this constitutional provision,

providing that you are otherwise qualified for the office. With a term of vacancy filled by another, separating and intervening your present term from the contemplated term, it can not be said that you be holding the office of coroner for over four years continuously in any period of time.

To succeed yourself by filling the unexpired term, we believe that you would be ineligible to the office at the general election to be held November 3, 1936. Such a compliance with the exception of Article IX, Section 11, supra, allowing those appointed to succeed themselves was not intended by the people. Such a compliance is but a literal compliance and is contrary to the spirit of the Constitution. Such a compliance would be but a subterfuge adopted to defeat the will of the people who intended rotation and non-succession, rather than abide by their will.

Our construction affords rotation and non-succession in office, intended by the people, and at the same time does not eliminate a trained and efficient officer from public service, except as the people, by their election, so eliminate.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

WOS:H

PRIMARY ELECTIONS: Candidate who has paid filing fee to Treasurer of Central Committee and filed timely declaration is entitled to have his name printed on the official ballot, but Treasurer of Central Committee should transfer fee to County Treasurer.

June 12, 1936. 6-12

FILED
100

Honorable H. Parker York,
Prosecuting Attorney,
Schuyler County,
Lancaster, Missouri.

Dear Sir:

This department is in receipt of your letter of June 10 wherein you present the following facts and request an opinion as to the same:

> "My county clerk has asked me to write you relative to a situation which he would like to have your immediate opinion on before he acts. The situation is this: A man by the name of Fred George, desiring to run for sheriff of this county as an independent, paid the statutory filing fee of $5.00 to the Treasurer of the Democratic Central Committee. The treasurer receipted him for the amount as follows:
>
> 'Received of Fred M. George the sum of $5.00 for filing fee for sheriff on Independent ticket.
>
> (Signed) Lois DeVinny
> by F. J. DeVinny
> Treasurer Schuyler County
> Democratic Committee.'
>
> "This receipt was in due time filed with the County Clerk and at the same time a declaration in due form was signed by George and filed with the County Clerk. This declaration designated George as

running on the independent ticket.

"The question is whether George has properly followed the law to qualify as an independent candidate and whether the Clerk is obligated to recognize him as such and have his name printed on the official ballot.

"In my opinion George did not properly qualify as an independent candidate by paying his filing fee to the Treasurer of the Democratic Committee. However, the County Clerk would appreciate your opinion on same as a protection to him."

We assume that Mr. George has attempted to comply with the terms of Section 10259, R.S. Mo. 1929, which is as follows:

"Any person desiring to file declaration papers, or propose as a candidate on any independent or nonpartisan ticket, who does not announce by declaration papers as a candidate for any political party as defined by this article, and is not a member of a political party having a state and county committee, or treasurer thereof, shall pay the sum of money required by this article to be paid by the candidate for the office for which he proposes to the state or county treasurer, as the case may be; take a receipt therefor, and file said receipt with his declaration papers; said sum of money so paid, shall go into the general revenue fund of the state or county."

We also assume that Mr. George's declaration was filed in conformity with the provisions of Section 10257, R.S. Mo. 1929, the pertinent part of which is as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which

> he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: * * * * *"

Section 10258, R.S. Mo. 1929 relates to the deposit fee that each candidate must pay and designates the amounts for certain offices and to certain persons in each instance. It appears that Mr. George has complied with all the requirements of filing his declaration as an independent candidate, the one irregularity being that instead of paying the $5.00 fee under Section 10259 to the "state or county treasurer as the case may be", he paid the same to the Treasurer of the Democratic Central Committee.

We think the provisions of Sec. 10257, supra, as to the declaration to be filed by a candidate are mandatory and must be followed strictly, but that the provisions of Sec. 10258 and 10259 are more or less directory and must only be complied with substantially. There is no decision directly in point on this question.

In the case of State ex rel. v. Roach, 258 Mo. 541, a question arose as to whether or not the declaration of a candidate desiring to run for judge of the Eighth Judicial Circuit in St. Louis should be filed with the Secretary of State or with the Board of Election Commissioners of the City of St. Louis. The court indicated that the matter was of slight importance and said (l.c. 550):

> "It is manifest that so far as any good or evil may befall from our holding this ambiguity either way none such can happen. For it makes no difference utterly in the practical working out of the contemplated primary election scheme whether we hold that declarations of candidacy of those desirous of running for judges of the Eighth Judicial Circuit, shall be filed with the Secretary of State or with the Board of Election Commissioners of the City of St. Louis. At least there is but the difference, perhaps, of a postage stamp between the one place of filing and the other. The crying need is to settle it once for all and

fix thereby a rule of action, obviating that thick doubt, which we were told by counsel in argument, has heretofore impelled every candidate for judge of the circuit court of the city of St. Louis to file declarations both with the Secretary of State and in the office of the Election Commissioners, hoping thereby to find the right and proper place. Nevertheless, it ought to be settled by a logical and fair construction of the terms of the troubling statute and not by brutally forcing a balance."

CONCLUSION

Inasmuch as the independent candidate has filed a timely declaration, which you state is in legal form, and has paid the $5.00 fee, it is our opinion that he is entitled to have his name printed upon the official ballot. He appears to have complied with all the requirements.

You state that the receipt for the $5.00 fee was presented to the county clerk along with his declaration. The treasurer of the Democratic Central Committee should not have accepted the fee and the county clerk should have detected the error at the time the declaration was filed. We think the Treasurer of the Democratic Central Committee should transfer the $5.00 fee to the County Treasurer, who in turn should issue the receipt and pay same into the General Revenue Fund of the county.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

OWN:AH

SPECIAL ROAD DISTRICT: Prosecuting Attorney is not required to represent special road districts.

August 28, 1936.

8-28 FILED 100

Honorable H. Parker Mork
Prosecuting Attorney
Schuyler County
Lancaster, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of August 19, 1936, which reads as follows:

> "The Commissioners of a special road district in my county tell me that they are building a new road in their district with the help of Govt. aid and have met with some difficulty in that one land owner refuses to give the right-of-way for the road. The question is this: what procedure should be followed to force this road through? Should I as Prosecuting Attorney of Schuyler County represent them or should they employ counsel of their own? Under section 8025 R. S. '29 they are made a body corporate and possess all usual powers of a corporation for public purposes. They are empowered to sue and be sued in their own name. Section 1340 R. S. '29 provides a special procedure for certain corporations and 'other corporations created under the laws of this state for public use' to follow in condemning property for their use. Would a special road district come under this latter section? Or would section 7840 R. S. '29 apply?
>
> "As this matter is urgent on account of the Govt. aid connected with it I will appreciate your giving it immediate attention."

We are assuming that the particular road district referred to in your letter was organized under Section 8024 R. S. Mo. 1929, which provides:

> "Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one hundred thousand inhabitants, may be organized as hereinafter set forth into a special road district: Provided, however, the provisions of this section shall not apply to counties under township organizations, and shall not apply to all counties in this state now containing or which may hereafter contain 50,000 inhabitants or more and lying adjoining any city of this state containing 300,000 inhabitants or more."

The following Section, 8025 R. S. Mo. 1929, provides that every district organized under the provisions of this Article shall be a body corporate and possess the usual power of corporation for public purposes. Said section provides as follows:

> "Every such district organized under the provisions of this article shall be a body corporate and possess the usual powers of a corporation for public purposes, and shall be known and styled '. . . . . special road district of . . . . . county,' as may be designated by the county court by order of record, and in that name shall be capable of suing and being sued and of contracting and being contracted with."

In the case of State ex rel. Wammack & Welborn v. Affolder 257 S. W. 493, l. c. 494 and 495, the Court said with regard to it being the duty of the Prosecuting Attorney of said county to represent said road district in looking after a bond issue:

> "Was it the duty of the prosecuting attorney to render the service which plaintiffs rendered? Section 736 and 738 prescribe generally the duties of the prosecuting attorney. There is nothing in these sections which may be said to place upon the prosecuting attorney the duty of looking after this bond issue. There are

> other sections prescribing duties in particular cases, but the sections, supra, cover the field generally. The bond issue of Duck Creek township was not a matter of county wide concern. It was a matter that affected that township only. The Act of 1917 provided that in a township bond issue thereunder the county court shall act for the township. The only recognition of township organization is that the act provides in section 10750 that the proceeds of the bond sale be turned over 'to the treasurer of the district or the county or township, as the case may be.' In the reference quoted, and in section 10748, it will be seen that, not only was township organization taken into account, but also special road districts organized under sections 10800 et seq. and sections 10833 et xeq., R. S. 1919. Neither the act of 19017, nor the Special Road District Acts, makes it the duty of the prosecuting attorney to advise or render service. * * * *. Since there is no statute directing generally that the prosecuting attorney shall act for the township in counties under township organization, it is our conclusion that it was not the official duty of the prosecuting attorney to r ender the services which plaintiffs rendered."

While State v. Affolder, supra, especially deals with the assistance of the Prosecuting attorney relative to a bond issue, we think the holding of the Court is to the problem here under consideration.

CONCLUSION

In view of the foregoing, it is the opinion of this department that, in the absence of any statutory provision requiring the Prosecuting Attorney to advise and assist

a special road district, there is no obligation upon him to render this service.

Yours very truly

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

ARH:H